DOCKET

No. 08-810
Vide 08-803, 08-826
Title: Sally L. Conkright, et al., Petitioners
v.
Paul J. Frommert, et al.
Docketed: December 30, 2008
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (07-0418)
Decision Date: July 24, 2008
Rehearing Denied: September 25, 2008
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Oct 17 2008	Application (08A336) for stay pending the filing and disposition of a petition for a writ of certiorari, submitted to Justice Ginsburg.
Oct 20 2008	Application (08A336) denied by Justice Ginsburg.
Dec 23 2008	Petition for a writ of certiorari filed. (Response due January 29, 2009)
Dec 23 2008	Appendix of petitioner Sally L. Conkright, et al. filed.
Jan 28 2009	Brief of Sixty-Two Respondents, Paul J. Frommert, et al., and Seven Cross- Respondents in opposition filed.
Jan 29 2009	Brief of Thirty-Three Respondents, Alvin M. Adams, et al. in opposition filed.
Jan 29 2009	Motion for leave to file amicus brief filed by Business Roundtable.
Feb 2 2009	Application (08A676) to file consolidated reply brief in excess of word limits, submitted to Justice Ginsburg.
Feb 10 2009	Letter from counsel for the petitioners withdrawing application (08A676) for consideration.
Feb 10 2009	Reply of petitioners Sally L. Conkright, et al. filed. (Distributed)
Feb 11 2009	DISTRIBUTED for Conference of February 27, 2009.
Mar 2 2009	The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.
Apr 9 2009	Application (08A884) for stay pending disposition of the petition for a writ of certiorari, submitted to Justice Ginsburg.
Apr 14 2009	Responses to application (08A884) requested by Justice Ginsburg, due close of business April 24, 2009.
Apr 24 2009	Joint response in opposition to application (08A884) filed.
Apr 30 2009	Application (08A884) denied by Justice Ginsburg. In Chambers Opinion issued by Justice Ginsburg.
May 28 2009	Brief amicus curiae of United States filed. VIDED.
Jun 8 2009	Supplemental brief of petitioners Sally L. Conkright, et al. filed. (Distributed)
Jun 9 2009	DISTRIBUTED for Conference of June 25, 2009.
Jun 29 2009	Motion for leave to file amicus brief filed by Business Roundtable GRANTED.
Jun 29 2009	Petition GRANTED.
Jul 20 2009	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including September 14, 2009.
Jul 20 2009	The time within which to file respondents' briefs on the merits is extended to and

	including November 13, 2009.
Sep 14 2009	Joint appendix filed. Statement of costs received.
Sep 14 2009	Brief of petitioners Sally L. Conkright, et al. filed.
Sep 21 2009	Brief amici curiae of Chief Actuaries filed.
Sep 21 2009	Brief amici curiae of Business Roundtable, et al. filed.
Sep 21 2009	Brief amici curiae of ERISA Industry Committee and American Benefits Council filed.
Nov 2 2009	SET FOR ARGUMENT ON Wednesday, January 20, 2010.
Nov 13 2009	Brief of respondents Paul J. Frommert, et al. filed.
Nov 20 2009	Brief amicus curiae of United States filed.
Nov 20 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 20 2009	Brief amici curiae of Janice C. Amara, et al. filed. (Distributed)
Nov 20 2009	Brief amicus curiae of AARP filed. (Distributed)
Nov 20 2009	Brief amicus curiae of National Employment Lawyers Association filed. (Distributed)
Nov 20 2009	Brief amici curiae of Law Professors filed. (Distributed)
Nov 20 2009	Brief amicus curiae of Richard C. Capone filed. (Distributed)
Nov 23 2009	CIRCULATED.
Dec 11 2009	Record received from U.S.C.A. for Second Circuit. (1 Box)
Dec 14 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Sotomayor took no part in the consideration or decision of this motion.
Dec 14 2009	Reply of petitioners Sally L. Conkright, et al. filed. (Distributed)
Dec 16 2009	Record received from U.S.D.C. for Western District of New York. (1 envelope and 2 boxes)
Jan 20 2010	Argued. For petitioners: Robert A. Long, Jr., Washington, D.C. For respondents: Peter K. Stris, Costa Mesa, Cal.; and Matthew D. Roberts, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

08-810 DEC 23 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No. 08-

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET AL.,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL D. RYAN
XEROX CORPORATION
45 Glover Avenue
Norwalk, CT 06856

MARGARET A. CLEMENS
NIXON PEABODY LLP
Clinton Square
P.O. Box 31051
Rochester, NY 14603

ROBERT D. WICK
Counsel of Record
RICHARD C. SHEA
ROBERT S. NEWMAN
CHRISTIAN J. PISTILLI
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Petitioners

December 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other Circuits, that a district court has no obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits.

2. Whether the Second Circuit erred in holding, in conflict with decisions of other Circuits, that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners in this case are present or former Xerox Corporation Pension Plan Administrators Sally L. Conkright, Patricia M. Nazemetz, and Lawrence M. Becker, as well as the Xerox Corporation Retirement Income Guarantee Plan. None of the Petitioners is a corporation, and, therefore, no Petitioner has issued any stock that is owned by any publicly-traded company. Xerox Corporation, which is no longer a party to this case, is a publicly-held company.

The Respondents in this case are Paul J. Frommert, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillian, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski, Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Kenneth W. Pietrowski,

Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Dennis E. Bains, Kathleen E. Hunter, John L. Crisafulli, Deborah J. Davis, Brenda H. McConnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Claudette M. Long, Dale Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Carter, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Gail J. Levy, John A. Williams, Crystal Thorton, Charles R. Drannbauer, William M. Burritt, and Janice Ross Heiler.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 11

I. The Second Circuit Decision Conflicts with Supreme Court and Circuit Authority Regarding the Deference Owed to Plan Administrators. 11

A. The Second Circuit Decision Conflicts with Decisions of Other Circuits 12

B. The Second Circuit's Decision Conflicts with This Court's Decisions in *Firestone* and *Glenn* 17

C. The Second Circuit Decision Presents a Recurring Issue of Exceptional Importance. 23

II. The Second Circuit Decision Conflicts with Authority from Other Circuits Regarding the Proper Standard of Appellate Review in Calculating Benefits Pursuant to Plan Terms. 28

A. The Second Circuit Decision Creates a Circuit Conflict. 29

B. The Second Circuit Decision Presents a Recurring Issue of Exceptional Importance. 33

CONCLUSION 34

APPENDIX

Frommert v. *Conkright*, 535 F.3d 111 (2d Cir. 2008) 1a

Frommert v. *Conkright*, 433 F.3d 254 (2d Cir. 2006) 22a

Frommert v. *Conkright*, 328 F. Supp. 2d 420 (W.D.N.Y. 2004) 61a

Frommert v. *Conkright*, 472 F. Supp. 2d 452 (W.D.N.Y. 2007) 99a

Frommert v. *Conkright*, No. 07-0418, Order Denying Appellants' Petition For Rehearing Or Rehearing En Banc (2d Cir. Sept. 25, 2008) 129a

ERISA § 502(a)(1)-(3), 29 U.S.C. § 1132(a)(1)-(3) 132a

Xerox Corporation Retirement Income Guarantee Plan, 1989 Restatement 134a

Affidavit of Lawrence M. Becker, Xerox Corporation Retirement Income Guarantee Plan Administrator (dated June 26, 2006) 144a

Frommert v. *Conkright*, No. 00-CV-6311, Transcript of Proceedings (W.D.N.Y. July 11, 2006) 155a

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Administrative Committee of Wal-Mart Associates Health & Welfare Plan v. *Willard*, 393 F.3d 1119 (10th Cir. 2004) 13

Barrett v. *Safeway Stores, Inc.*, 538 F.2d 1311 (8th Cir. 1976) 31

Benefits Committee of Saint-Gobain Corp. v. *Key Trust Co. of Ohio, N.A.*, 313 F.3d 919 (6th Cir. 2002) 32

Berger v. *AXA Network LLC*, 459 F.3d 804 (7th Cir. 2006) 34

Central States, Southeast & Southwest Areas Pension Fund v. *Central Transport, Inc.*, 472 U.S. 559 (1985) 18-19

DeVito v. *Aetna, Inc.*, 536 F. Supp. 2d 523 (D.N.J. 2008) 24

Eddy v. *Prudence Bonds Corp.*, 165 F.2d 157 (2d Cir. 1947) 30-31

Egelhoff v. *Egelhoff*, 532 U.S. 141 (2001) 28, 34

Elder v. *Holloway*, 510 U.S. 510 (1994) 33

Emor, Inc. v. *Cyprus Mines Corp.*, 467 F.2d 770 (3d Cir. 1972) 31

Evans v. *Eaton Corp. Long Term Disability Plan*, 514 F.3d 315 (4th Cir. 2008) 26

FDIC v. *Brants*, 2 F.3d 147 (5th Cir. 1993) 31

Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989) ..... *passim*

Fort Halifax Packing Co., Inc. v. *Coyne*, 482 U.S. 1 (1987) 27

Fought v. *UNUM Life Insurance Co. of America*, 379 F.3d 997 (10th Cir. 2004) 20-21

Gallo v. *Amoco Corp.*, 102 F.3d 918 (7th Cir. 1996) 23-24

Harte v. *Bethlehem Steel Corp.*, 214 F.3d 446 (3d Cir. 2000) 13

Hunter v. *Caliber System, Inc.*, 220 F.3d 702 (6th Cir. 2000) 13

Kimber v. *Thiokol Corp. Disability Benefit Plan*, 196 F.3d 1092 (10th Cir. 1999) 15

Lawrence v. *Chater*, 516 U.S. 163 (1996) 22

Lunn v. *Montgomery Ward & Co., Inc.*, 166 F.3d 880 (7th Cir. 1999) 4, 31-32

Mazurek v. *Armstrong*, 520 U.S. 968 (1997) 33

Metropolitan Life Insurance Co. v. *Glenn*, 128 S. Ct. 2343 (2008) ..... *passim*

Miller v. *Xerox Corp. Retirement Income Guaranty Plan*, 464 F.3d 871 (9th Cir. 2006) 9, 27

Moench v. *Robertson*, 62 F.3d 553 (3d Cir. 1995) 24-25

Morton v. *Smith*, 91 F.3d 867 (7th Cir. 1996) 15

NLRB v. *Hobart Brothers Co.*, 372 F.2d 203 (6th Cir. 1967) 31

Oliver v. *Coca Cola Co.*, 497 F.3d 1181 (11th Cir. 2007) 16

Oliver v. *Coca Cola Co.*, 546 F.3d 1353 (11th Cir. 2008) 12-13, 16

PBGC v. *LTV Corp.*, 496 U.S. 633 (1990) 25

Pagan v. *NYNEX Pension Plan*, 52 F.3d 438 (2d Cir. 1995) 15

Pakovich v. *Broadspire Services, Inc.*, 535 F.3d 601 (7th Cir. 2008) 23

Perrino v. *Southern Bell Telephone & Telegraph Co.*, 209 F.3d 1309 (11th Cir. 2000) 24

Pinto v. *Reliance Standard Life Insurance Co.*, 214 F.3d 377 (3d Cir. 2000) 21

Robinson v. *Story*, 469 U.S. 1081 (1984) 22

Sullivan v. *LTV Aerospace & Defense Co.*, 82 F.3d 1251 (2d Cir. 1996) 20

Varity Corp. v. *Howe*, 516 U.S. 489 (1996) 3, 25, 34

Welsh v. *Burlington Northern, Inc., Employee Benefits Plan*, 54 F.3d 1331 (8th Cir. 1995) 32

Wilczynski v. *Lumbermens Mutual Casualty Co.*, 93 F.3d 397 (7th Cir. 1996) 24

Winters v. *Costco Wholesale Corp.*, 49 F.3d 550 (9th Cir. 1995) 15

Worthy v. *New Orleans Steamship Association*, 342 F.3d 422 (5th Cir. 2003) 13, 24

Young v. *Verizon's Bell Atlantic Cash Balance Plan*, 575 F. Supp. 2d 892 (N.D. Ill. 2008) 25

Zimmerman v. *Sloss Equipment, Inc.*, 72 F.3d 822 (10th Cir. 1995) 30

FEDERAL RULES AND STATUTES

26 C.F.R. § 1.401(a)(4)-12 8

28 U.S.C. § 1254 1

28 U.S.C. § 1291 1

29 U.S.C. § 1002 3-4

29 U.S.C. § 1132 ..... *passim*

MISCELLANEOUS

Restatement (Second) of Trusts § 187 (1959) 17

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The 2008 opinion of the Second Circuit is reported at 535 F.3d 111. (Pet App. 1a-21a.) The 2006 opinion of the Second Circuit is reported at 433 F.3d 254. (*Id.* at 22a-60a.) The opinion of the District Court on summary judgment is reported at 328 F. Supp. 2d 420. (*Id.* at 61a-98a.) The District Court's remedies opinion is reported at 472 F. Supp. 2d 452. (*Id.* at 99a-128a.)

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2008. (*Id.* at 2a.) The court of appeals denied a petition for rehearing on September 25, 2008. (*Id.* at 129a-31a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291.

STATUTES INVOLVED

Sections 502(a)(1)-(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)-(3), is reprinted in the appendix. (*Id.* at 132a-33a.)

STATEMENT OF THE CASE

Petitioners are the Xerox Corporation Retirement Income Guarantee Plan (the "Plan") and present or former Plan Administrators. Respondents are participants in the Plan who successfully challenged

one of the Plan's provisions as not having been lawfully added to the Plan until 1998. As a result of Respondents' successful challenge, the courts below were required to determine the benefits due to Respondents under the remaining terms of the Plan. In reviewing the District Court's interpretation of the remaining Plan provisions, the Second Circuit made two significant errors that warrant this Court's review.

First, the Second Circuit held that the well-established rule that courts must defer to a plan administrator's reasonable interpretation of an ERISA plan does not apply when the plan administrator interprets the plan outside the context of an administrative claim for benefits. That holding squarely conflicts with decisions of this Court and other Circuits. It also has dramatic consequences under ERISA because plan administrators frequently interpret plans outside the context of administrative claims proceedings.

Second, the Second Circuit held that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of a pension plan if the interpretation is rendered in the course of determining the additional benefits due to a plan participant as a result of a violation of law. That holding creates the untenable prospect that the very same plan will be subject to different "reasonable" interpretations rendered by different courts. It also departs from overwhelming precedent holding that appellate courts owe no deference to a district court's interpretation of the terms of a plan.

Review is warranted because the Second Circuit's decision critically undermines important ERISA principles. A paramount goal of ERISA is the uniform and consistent administration of employee benefit plans. Because such plans are provided by employers voluntarily, ERISA was designed in part to ensure that administrative expense and litigation uncertainty do not discourage employers from offering them at all. *See Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). The principal means by which ERISA ensures uniform national plan administration and protects employers from surprising or contradictory plan interpretations is deference to the reasonable decisions of plan administrators. Review is warranted because the Second Circuit's errors thwart these principles.

1. The Xerox Plan. The Plan provides benefits pursuant to a so-called "floor-offset" arrangement – an arrangement that guarantees employees a floor benefit that limits their exposure to investment losses in their individual retirement accounts while allowing them to benefit from their accounts' investment gains.

Under a typical floor-offset arrangement, employees participate in both a defined benefit plan and a defined contribution plan.[1] The defined benefit

---

[1] In a defined contribution plan, such as a so-called 401(k) plan, an employee's benefit consists solely of the plan assets allocated to the employee's individual account, including any investment gains or losses. *See* 29 U.S.C. § 1002(34). In a defined benefit plan, an employee receives a guaranteed benefit – typically calculated by reference to the employee's age, years of service,

plan specifies a minimum level of benefits, or "floor," to which employees are entitled based on their service to the employer. The value of the defined benefit floor is reduced, or "offset," by the pension attributable to the employee's individual defined contribution account. Thus, if the defined contribution account would provide a pension that is equal to or greater than the employee's defined benefit, the employee receives a benefit only from the defined contribution plan.[2] *See generally Lunn* v. *Montgomery Ward & Co., Inc.*, 166 F.3d 880, 881 (7th Cir. 1999) (describing the operation of floor offset arrangements).

Respondents are current or former employees of Xerox who worked for Xerox for a period of time, left Xerox's employ, and later were rehired by Xerox. (Pet. App. 25a.) When their first period of employment with Xerox ended, each Respondent received a lump sum distribution of benefits from the Plan. (*Id.*) Respondents resumed earning benefits after they were rehired. (*Id.*)

---

and salary – in an amount that is specified by the terms of the plan. *See id.* § 1002(35).

[2] In this case, the Plan provides that an employee's total pension benefit shall come, first, from the employee's individual defined contribution account and, second, shall be augmented by the amount (if any) required to bring the employee's benefit up to the floor specified by one of two potentially applicable formulas under the defined benefit portion of the arrangement. (*See id.* at 134a-41a.)

In calculating the floor benefits due to these rehired employees upon retirement, the Plan takes account of *all* of their service to Xerox – including service rendered during their first period of employment. (*Id.* at 25a-26a.) Unless this floor benefit is adjusted to take into account the lump sum payments that these employees received based on their original periods of service, such employees would receive double credit for that initial service. Thus, the Plan provides that the pension benefits of rehired employees must be reduced by the value of their initial lump sum distributions.

Two Plan provisions address this reduction. The first provision, known as the "non-duplication of benefits" provision, states that the pension benefit for an employee who previously received a lump sum distribution "shall be offset by the *accrued benefit* attributable to such distribution." (*Id.* at 141a (emphasis added).) "Accrued benefit" is a defined term under the Plan. (*Id.* at 134a-35a.) The second provision, which the Second Circuit referred to as a "phantom account" offset provision, specifies a further refinement in the way that the non-duplication of benefits provision is applied. (*See id.* at 4a-5a.)

This petition arises from a dispute about how the Plan should be construed taking account of the non-duplication of benefits provision, but without reference to the so-called "phantom account" offset provision.

2. In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989), this Court held that if an

ERISA plan grants the plan administrator discretionary authority to construe the terms of the plan, the administrator's interpretation of plan language is entitled to deference.

Here, the Plan expressly vests the Plan Administrator with broad discretionary authority, including authority to "[c]onstrue the Plan." (*Id.* at 142a.) A 1993 Plan Restatement clarifies that this authority includes the power to "resolve any ambiguity with respect" to the Plan. (*Id.* at 78a.) Nothing in the Plan limits this authority to interpretations rendered in the context of an administrative determination of the benefits due to participants or withdraws it when it is exercised in litigation.

3. The *Frommert* Lawsuit. Respondent Frommert wrote to the Plan Administrator in 1996 regarding his projected retirement benefit, which had been reduced to take account of a prior lump sum distribution he received. (*Id.* at 74a.) The Plan Administrator deemed Frommert's letter to be a request for additional benefits, which it denied on the ground that his benefit had been properly calculated in accordance with the Plan's so-called "phantom account" offset provision and other applicable provisions. (*See id.*) Frommert subsequently filed an administrative appeal of the denial of his benefits claim, which was also timely denied. (*Id.*)

In November 1999, Frommert and a number of other Respondents filed the instant lawsuit, which challenged the lawfulness of the so-called "phantom

account" offset provision. (*Id.* at 74a-75a.) On July 30, 2004, the District Court granted Petitioners' motion for summary judgment, thereby rejecting Respondents' claim. (*Id.* at 98a.)

On January 6, 2006, the Second Circuit issued an opinion reversing the District Court in part ("*Frommert I*"). The Second Circuit held that the Plan was not properly amended to include the so-called "phantom account" offset provision until 1998, when adequate notice of its terms was provided to plan participants. (*Id.* at 49a.) Its holding, however, did not disturb the non-duplication of benefits provision, which Respondents never challenged.

The Second Circuit remanded the case to the District Court with instructions to "utilize an appropriate pre-amendment calculation to determine [Respondents'] benefits." (*Id.* at 51a.) As the Second Circuit explained, in order to "fashion[] the appropriate remedy," the District Court would need to determine, under the "pre-amendment terms of the Plan" – that is, pursuant to the non-duplication of benefits provision and other remaining Plan provisions – "how prior distributions were to be treated." (*Id.*)

At the same time, the Second Circuit affirmed in relevant part the District Court's dismissal of Respondents' claim for equitable relief pursuant to ERISA § 502(a)(3), 29 U.S.C § 1132(a)(3), which generally is unavailable where another provision of ERISA provides an adequate remedy. (*Id.* at 53a-55a.) The Second Circuit rejected Respondents' claim for equitable relief because the relief they sought –

"recalculation of their benefits consistent with the terms of the Plan" – "falls comfortably within the scope of § 502(a)(1)(B)," 29 U.S.C. § 1132(a)(1)(B), which allows a plan participant to sue for "the benefits due him under the terms of his plan." (*Id.* at 53a.)

4. Proceedings On Remand. On remand, the District Court requested that the parties present evidence regarding the proper calculation of benefits for rehired employees under the pre-amendment terms of the Plan. Pursuant to his discretionary authority to construe the Plan, the Plan Administrator responded by formally submitting his interpretation of those terms to the District Court. (*Id.* at 144a-54a.)

According to the Plan Administrator, the non-duplication of benefits provision, taken together with the Plan's definition of the term "accrued benefit," has a clear and discernable meaning: it requires that the benefits of rehired employees be offset by the present-day economic value, or "actuarial equivalent," of the employees' initial lump sum distributions. (*See id.* at 147a-52a.)[3] The Ninth

---

[3] Two different types of benefits (*e.g.*, a lump sum benefit and a life annuity) are "actuarially equivalent" if they have the same present value. *See* 26 C.F.R. § 1.401(a)(4)-12 (2008). Here, the Plan specifies that the "accrued benefit" attributable to an employee's defined contribution account is an actuarially equivalent annuity. Specifically, in calculating an employee's "accrued benefit" at retirement, the employee's defined contribution account (which is named the "Transitional Retirement Account") must be expressed as the annuity that could be purchased with the account using interest rate

Circuit upheld this method of calculating rehired Xerox employees' benefits as lawful and proper in another case involving the Xerox Plan. *See Miller* v. *Xerox Corp. Ret. Income Guar. Plan*, 464 F.3d 871, 875-76 (9th Cir. 2006).

The District Court nonetheless rejected this interpretation. According to the District Court, in light of the "not-very-clear language" in the pre-amendment Plan, the "ambiguity as to th[e] [offset calculation] formula . . . must be resolved in favor of the employee." (*Id.* at 107a.) The District Court therefore held that Respondents' benefits may be offset only by the *nominal* amounts of their initial lump sum distributions rather than their present-day actuarial equivalent. (*Id.* at 8a-9a.) As even Respondents' own expert recognized, however, merely offsetting by the nominal amounts of the prior distributions – as opposed to their equivalent in today's dollars – confers an enormous windfall on rehired employees by failing to account for the time value of money. (*Id.* at 156a-58a.)

---

assumptions established by the Pension Benefit Guarantee Corporation. (*See* Pet. App. 26a-27a; *id.* at 141a.) The Plan Administrator accordingly interpreted the non-duplication of benefits provision – which states that the pension benefit for an employee who previously received a lump sum distribution "shall be offset by the accrued benefit attributable to such distribution" – to require an offset equal to the annuity that is actuarially equivalent to the prior lump sum distribution (using Plan-specified interest rate and mortality assumptions). (*Id.*; *id.* at 147a-52a.)

5. The *Frommert II* Decision. On appeal from the District Court's remedies opinion, the "basic question" reviewed by the Second Circuit was how to ensure that Xerox employees rehired prior to 1998 "received their due benefits in light of the ambiguous non-duplication of benefits provision." (*Id.* at 8a.) Petitioners argued that, in answering this question, the District Court should have deferred to the Plan Administrator's reasonable interpretation of the Plan provisions. (*Id.* at 10a.) The Second Circuit rejected that argument in an opinion issued on July 24, 2008.

The Second Circuit recognized that where, as here, an ERISA plan administrator is given "discretionary authority to 'construe the terms of the plan,'" the administrator's interpretation of plan language is entitled to deference. (*Id.* at 12a-13a.) The Second Circuit further acknowledged that the Plan Administrator's views were so thoroughly presented to the District Court that "nothing . . . might have been gained by the District Court's remanding the matter to the plan administrator" to provide him with an opportunity to interpret the Plan provisions. (*Id.* at 11a.)

The Second Circuit observed that there were "several reasonable alternatives" for construing the non-duplication of benefits provision, and it never suggested that the Plan Administrator's interpretation was not among these reasonable alternatives. (*Id.* at 13a-14a.) It nonetheless held that the District Court was not obliged to defer to the Plan Administrator's considered interpretation of the Plan language in question. (*Id.* at 13a.) According to the Second Circuit, the interpretation of the Plan

offered on remand was a "mere *opinion*" of the Plan Administrator to which no deference was due because it was not part of the original benefits decision made in response to Respondents' administrative challenges to their benefit calculations. (*See id.* (withholding *Firestone* deference because the District Court "had no decision to review because the plan administrator never rendered any decision other than the original benefit determinations").)

In addition to holding that the District Court had no obligation to defer to the Plan Administrator's construction of the Plan, the Second Circuit also held that *it* was required to defer to the District Court's interpretation. (*Id.*) Rather than review *de novo* the District Court's determination of the "proper level of pension benefits" under the terms of the Plan, the Second Circuit stated that it would review the District Court's interpretation of the Plan only "for an excess of allowable discretion," and thus affirmed the District Court's interpretation as "one reasonable approach among several reasonable alternatives." (*Id.* at 8a; *id.* at 13a-14a.)

REASONS FOR GRANTING THE WRIT

I. The Second Circuit Decision Conflicts with Supreme Court and Circuit Authority Regarding the Deference Owed to Plan Administrators.

In a line of cases involving ERISA plans, this Court has held that when a plan grants a plan administrator the authority to interpret the terms of the plan, the administrator's interpretation of plan

language is entitled to deference. *See, e.g.*, *Metropolitan Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343, 2350-52 (2008); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-11 (1989). The Second Circuit carved out a broad exception to this rule: it held that no deference is due to a plan administrator's interpretation of plan language when the administrator interprets the plan outside of the plan's administrative claims process. That holding conflicts with decisions of other courts of appeals and with this Court's decisions in *Firestone* and *Glenn*.

Review should be granted to resolve this Circuit conflict, to ensure that the Second Circuit's decision does not thwart this Court's recent decision in *Glenn*, and to vindicate ERISA's fundamental goal of assuring uniform and consistent interpretations of ERISA plans.

A. The Second Circuit Decision Conflicts with Decisions of Other Circuits.

In the wake of this Court's decision in *Firestone*, most courts have held that *Firestone* deference applies to a plan administrator's interpretation of plan language regardless of the particular forum in which the plan administrator offers its interpretation. Accordingly, the courts of appeals for the Third, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have held that *Firestone* deference applies to plan administrator interpretations offered in a variety of contexts other than administrative determinations of participants' benefits. *See Oliver* v. *Coca Cola Co.*, 546 F.3d 1353, 1354 (11th Cir. 2008)

(holding that a district court must defer to a plan administrator's reasonable interpretation of plan terms offered in the course of litigation); *Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1123 (10th Cir. 2004) (deferring to plan administrators' interpretation of a reimbursement and subrogation provision advanced by the administrator in action against plan beneficiary brought pursuant to that provision); *Worthy* v. *New Orleans Steamship Assoc.*, 342 F.3d 422, 427-28 (5th Cir. 2003) (granting deference to trust administrator's interpretation of trust language rendered in ERISA suit alleging that the trust administrator breached his duties under the trust); *Hunter* v. *Caliber Sys., Inc.*, 220 F.3d 702, 711 (6th Cir. 2000) (finding "no barrier to application of the [*Firestone*] arbitrary and capricious standard in a case . . . not involving a typical review of denial of benefits" and thus deferring to an interpretation of the plan expressed by means of a plan amendment); *Harte* v. *Bethlehem Steel Corp.*, 214 F.3d 446, 448, 450 (3d Cir. 2000) (upholding plan administrator's interpretation of a plan document as reasonable based on the deposition testimony of the plan administrator).

In conflict with these decisions, the decision below holds that *Firestone* deference applies only when a plan administrator offers its interpretation of the plan in the course of an administrative determination of a participant's benefit.

1. It is undisputed that the Plan at issue here grants "broad authority to the administrator to interpret the provisions of the Plan." (Pet. App. 78a.)

It is also undisputed that the Plan Administrator provided the District Court with a considered interpretation of the Plan provisions at issue in "briefs and at oral argument, in a sworn affidavit from the plan administrator, and in a written report and accompanying testimony from an independent actuary who analyzed the plan administrator's approach." (*Id.* at 11a.) The Second Circuit nonetheless held that the District Court had no obligation to defer to what it characterized as the "mere *opinion*" of the Plan administrator. (*Id.* at 13a.)[4]

In denigrating the Plan Administrator's interpretation as a mere opinion to which no deference was due, the Second Circuit did not suggest that the Plan Administrator had failed to provide a considered interpretation of the Plan. To the contrary, the Second Circuit acknowledged that the Plan Administrator had placed his interpretation of the Plan before the District Court so thoroughly that "nothing" would have been gained by remanding

---

[4] It is not the case that the District Court and the Plan Administrator construed on remand the same Plan terms that the Second Circuit found to have violated ERISA in *Frommert I*. In *Frommert I*, the Second Circuit held that the so-called "phantom account" offset provision had not properly been added to the Plan until 1998, and therefore could not validly be applied to pre-1998 rehires. (Pet. App. 49a.) Accordingly, it remanded to the District Court with instructions to interpret the "pre-amendment terms of the Plan" – *i.e.*, to interpret the non-duplication of benefits provision and the other remaining Plan terms in the absence of the so-called "phantom account" offset provision. (*Id.* at 51a.)

the matter to the Plan Administrator for further administrative proceedings. (*Id.* at 11a.)

Rather, the Second Circuit dismissed the Plan Administrator's interpretation of the pre-amendment terms of the Plan because it was not rendered in the course of a "benefit determination[]." (*Id.* at 13a.) In the Second Circuit's view, this meant that the District Court had only an "opinion" of the Plan Administrator, not a "decision" to review for an abuse of discretion. (*Id.*) The Second Circuit thus carved out an unwarranted exception to the usual rule of *Firestone* deference for plan administrator interpretations offered outside the course of administrative benefit determinations.[5]

2. In conflict with the Second Circuit's decision, each of the court of appeals decisions noted above (at pp. 12-13) holds that *Firestone* deference *does* apply outside the context of an administrative claim for

---

[5] The Second Circuit also implied that it was appropriate to construe the "ambiguous" Plan terms in favor of Respondents pursuant to the *contra proferentem* doctrine. (Pet. App. 13a-14a.) As the Second Circuit has itself acknowledged, however, "application of the rule of *contra proferentem* is limited to those occasions in which th[e] Court reviews an ERISA plan *de novo*." *Pagan* v. *NYNEX Pension Plan*, 52 F.3d 438, 443-44 (2d Cir. 1995); *accord Kimber* v. *Thiokol Corp. Disability Benefit Plan*, 196 F.3d 1092, 1100 (10th Cir. 1999); *Morton* v. *Smith*, 91 F.3d 867, 871 n.1 (7th Cir. 1996); *Winters* v. *Costco Wholesale Corp.*, 49 F.3d 550, 554 (9th Cir. 1995). Thus, the Second Circuit's invocation of *contra proferentem* was a direct *result* of its erroneous holding that the Plan Administrator was not entitled to deference, *not* an independent basis upon which to deny deference.

benefits. The conflict is particularly stark with respect to the Eleventh Circuit's decision in *Oliver* v. *Coca-Cola Co.*, 546 F.3d at 1354.

In *Oliver*, after finding that the plan administrator's denial of benefits violated the applicable arbitrary and capricious standard of review, *see* 497 F.3d 1181, 1195-96 (11th Cir. 2007), the Eleventh Circuit remanded to the district court for a remedies calculation based on the terms of the plan, *see* 546 F.3d at 1354. As the Eleventh Circuit explained, because the participant's benefits claim had initially been denied, the plan administrator had not yet had an opportunity to interpret the plan provisions governing the calculation of the participant's benefit. *See id.* at 1353-54. The Eleventh Circuit, therefore, instructed the district court to receive evidence from the plan administrator regarding its interpretation of the plan and *to apply the deferential standard of review articulated by this Court in Glenn when considering that interpretation on remand. See id.* at 1354.

Oliver requires *Firestone* deference to the plan administrator's interpretation of an ERISA plan even when the plan administrator offers its interpretation in litigation, and in particular, following a remand from a court of appeals. Here, by contrast, the Second Circuit followed the opposite approach under very similar circumstances. Specifically, after holding in *Frommert I* that the Plan Administrator could not apply the so-called "phantom account" offset provision to employees rehired prior to 1998, the Second Circuit held that the Plan Administrator's interpretation of the

remaining Plan terms offered on remand was entitled to *no* deference because it was not offered in the course of an administrative determination of the participants' benefits.

This Court should grant the petition to resolve the conflict between *Oliver* and the other court of appeals decisions deferring to plan administrator interpretations rendered outside the context of administrative claims for benefits, on the one hand, and the decision of the Second Circuit denying deference in such cases, on the other.

B. The Second Circuit's Decision Conflicts with This Court's Decisions in *Firestone* and *Glenn*.

1. In *Firestone*, this Court observed that "ERISA abounds with the language and terminology of trust law," and concluded that it "should be guided by principles of trust law" in "determining the appropriate standard of review" in cases seeking an award of benefits due under the terms of an ERISA plan. 489 U.S. at 110-11. Trust law, moreover, counsels that "[a] trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable." *Id.* at 111; *accord* Restatement (Second) of Trusts § 187 (1959) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion."). This Court therefore concluded that in an ERISA benefits action, if the plan gives the administrator "discretionary authority

to . . . construe the terms of the plan," courts must defer to any reasonable interpretation of ambiguous plan terms offered by the administrator. *Firestone*, 489 U.S. at 115.

The Second Circuit's denial of *Firestone* deference to plan administrator interpretations that are rendered outside the context of administrative claims for benefits is fundamentally at odds with *Firestone*. *Firestone* drew no distinction between plan interpretations that are rendered in an administrative claims process and interpretations that are rendered in other contexts. To the contrary, *Firestone* holds that the source of the deference accorded to a plan administrator's interpretation of plan documents is *the text of the plan documents themselves* – just as the deference due to a trustee's interpretation of a trust is derived from the trust documents themselves. *See id.* at 111 ("Whether 'the exercise of a power is permissive or mandatory depends upon the terms of the trust.'" (quoting 3 W. Fratcher, Scott on Trusts 187, p. 14 (4th ed. 1988))). Here, the text of the Plan grants the Plan Administrator authority to construe the Plan regardless of the particular forum in which that construction is offered. Nothing in the text of the Plan indicates that deference is limited to constructions rendered during an administrative claims process. (*See* Pet. App. 141a-42a.)

In rejecting the rule of *Firestone* deference for plan interpretations offered outside of an administrative claims proceeding, the Second Circuit also overlooked this Court's earlier decision in *Central States, Southeast & Southwest Areas Pension*

Fund v. *Central Transport, Inc.*, 472 U.S. 559 (1985). There, this Court deferred to a plan administrator's considered views presented for the first time in the course of litigation. *See id.* at 568 (awarding "significant weight" to an ERISA trustee's interpretation of the trust document covering a multi-employer plan and therefore holding that the trustee was entitled to audit the records of a participating employer).

2. If there were any room for doubt about whether the Second Circuit's decision conflicts with *Firestone*, it was eliminated by this Court's recent decision in *Glenn*. That case followed *Firestone* in holding that courts "should analogize a plan administrator to the trustee of a common-law trust" in determining the appropriate standard of review for ERISA benefits claims. *Glenn*, 128 S. Ct. at 2347. Thus, where a plan grants its administrator discretionary authority to construe the terms of the plan, *Glenn* reaffirms that "'[t]rust principles make a *deferential standard* of review appropriate.'" *Id.* at 2348 (emphasis in original) (citations omitted).

Glenn makes doubly clear what should have been apparent from *Firestone*: judicial deference to a plan administrator's interpretation of an ERISA plan flows from the common law of trusts and the terms of the underlying plan documents. *See id.* The Second Circuit nonetheless devised a broad exception to the usual rule of *Firestone* deference that had no basis in the terms of the Plan or the law of trusts.[6] The

---

[6] There is no analogue to an administrative claims proceeding for common-law trusts. A trust beneficiary who disagrees with

Second Circuit did not explain precisely *why* an interpretation of a plan offered in litigation deserves no *Firestone* deference, but the only apparent rationale for such a conclusion is a conflict of interest rationale: an interpretation offered in the course of litigation might be thought to be tainted by a conflict of interest.

Glenn specifically rejected this rationale, as well as the Second Circuit's general approach of devising arbitrary tests for limiting the scope of *Firestone* deference. In *Glenn*, the Court considered whether a plan administrator's interpretation of an ERISA plan is still entitled to deference when the plan administrator is acting under a conflict of interest. In the wake of the *Firestone* decision, several courts of appeals had devised elaborate tests for determining when a conflict of interest purportedly requires a court to deny *Firestone* deference to a plan administrator's interpretation of an ERISA plan.[7]

---

the trustee's interpretation of the trust instrument would need to challenge that interpretation in court, and the trustee's interpretation would be given deference in that proceeding. *See generally Firestone*, 489 U.S. at 110-11. Thus, the Second Circuit's holding that a plan administrator's interpretation of a plan is not entitled to deference unless it is articulated in an administrative claims proceeding is inconsistent with the common law of trusts.

[7] For instance, the Second Circuit held that if "the administrator was in fact influenced by [a] conflict of interest, the deference otherwise accorded the administrator's decision drops away and the court interprets the plan *de novo*." *Sullivan* v. *LTV Aerospace & Defense Co.*, 82 F.3d 1251, 1255-56 (2d Cir. 1996); *see also Fought* v. *UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1006-07 (10th Cir. 2004) (holding that administrators

Glenn rejected such tests as unjustified departures from *Firestone*. *See Glenn*, 128 S. Ct. at 2350-52. In doing so, this Court warned against the use of "talismanic" rules and formulas as a substitute for the art of judging. *See id.* at 2352 (quoting *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 489 (1951)). Accordingly, it held that a conflict of interest does not support a change in the standard of review "from deferential to *de novo*," but instead is simply a "factor" that courts should consider in determining whether a plan administrator has abused its *Firestone* discretion. *Glenn*, 128 S. Ct. at 2350.

The Second Circuit here did precisely what this Court prohibited in *Glenn*: it invented an arbitrary test for stripping away *Firestone* deference from a plan administrator's interpretation of an ERISA plan. Moreover, if an actual conflict of interest is merely a factor to consider in determining whether a plan administrator has abused its *Firestone* discretion, then it follows *a fortiori* that the particular forum in which the plan administrator offers its interpretation of the plan is likewise no more than a factor to consider – *not* a basis for denying deference altogether.

3. Supreme Court review should be granted to eliminate the conflict between the Second Circuit

---

acting under a possible conflict of interest have the burden of showing that their decision to deny disability benefits is supported by substantial evidence); *Pinto* v. *Reliance Standard Life Ins. Co.*, 214 F.3d 377, 393 (3d Cir. 2000) (holding that the possibility of a conflict of interest triggers a sliding scale standard of review).

decision and this Court's decisions in *Firestone* and *Glenn*. In the absence of such review, the Second Circuit's decision threatens to nullify the deferential standard of review that this Court sought to implement in *Glenn* and resurrect the practice of devising arbitrary tests for withdrawing *Firestone* deference.

Alternatively, this Court should grant the petition, vacate the Second Circuit's order, and remand this case in light of *Glenn*. The Second Circuit issued its opinion only a few weeks after *Glenn* was decided, and the Second Circuit's opinion gives no indication that the court had reviewed or considered *Glenn* at the time it issued its decision. A remand would be appropriate because there is a reasonable probability that the Second Circuit would reconsider its opinion if it were directed to consider the implications of *Glenn*. *See Lawrence* v. *Chater*, 516 U.S. 163, 167-68 (1996) (indicating that a GVR may be appropriate where "recent developments that we have reason to believe the court below did not fully consider[] reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration"); *Robinson* v. *Story*, 469 U.S. 1081 (1984) (granting, vacating and remanding in light of Supreme Court opinion issued shortly before court of appeals' decision).

C. The Second Circuit Decision Presents a Recurring Issue of Exceptional Importance.

According to the Second Circuit, *Firestone* deference does not apply unless a plan administrator's interpretation of an ERISA plan is initially offered within the context of an administrative claims proceeding. This holding, if allowed to stand, will undo this Court's decisions in *Firestone* and *Glenn* in large numbers of cases and will discourage employers from offering employee benefit plans.

1. Plan administrators are called upon to interpret the plans they administer virtually every day, and their interpretations often are rendered outside the setting of administrative claims for benefits. *See, e.g.*, pp. 12-13 (citing cases presenting various contexts in which courts have deferred to plan administrator's plan interpretations). For instance, the exception to *Firestone* deference created by the Second Circuit would apply in numerous cases in which an issue of plan interpretation first arises during the course of litigation.[8] It also would apply in

---

[8] The Seventh Circuit, among other courts, has recognized that plan interpretation issues often arise in the course of litigation and has held – in conflict with the Second Circuit's decision – that *Firestone* deference applies in such cases. *See Pakovich* v. *Broadspire Servs., Inc.*, 535 F.3d 601, 606 (7th Cir. 2008) (observing that a court must seek the views of the plan administrator if an interpretive issue "did not ripen into an 'apple' ready to be bitten" until after an initial court ruling); *Gallo* v. *Amoco Corp.*, 102 F.3d 918, 923 (7th Cir. 1996) (Posner, C.J.) (observing that if, during litigation, a plan administrator's

the many cases in which participants avail themselves of exceptions to the discretionary requirement to exhaust a plan's internal claims procedure before filing suit in court.[9] And it would apply in many more cases alleging that plan fiduciaries breached their fiduciary duties to plan participants by failing to follow plan terms.[10]

---

interpretation of a plan term requires additional explanation, a court must seek that explanation from the administrator and may not substitute its own interpretation).

[9] *See Perrino* v. *Southern Bell Tel. & Tel. Co.*, 209 F.3d 1309, 1315 (11th Cir. 2000) ("The decision of a district court to apply or not apply the exhaustion of administrative remedies requirement for ERISA claims is a highly discretionary decision. . . ."); *Wilczynski* v. *Lumbermens Mut. Cas. Co.*, 93 F.3d 397, 404-05 (7th Cir. 1996) (holding that plan participant had adequately alleged that it would be futile for her to exhaust administrative remedies and therefore reversing district court's dismissal of her benefits claim); *DeVito* v. *Aetna, Inc.*, 536 F. Supp. 2d 523, 532 (D.N.J. 2008) (denying motion to dismiss claim for benefits on the ground that pursuing plan's internal appeals process would have been futile).

[10] Other Circuits have recognized – in conflict with the decision of the Second Circuit – that when plan administrators are sued for breaching their fiduciary duties by failing to follow plan terms, the administrator's interpretation of plan terms is entitled to deference, notwithstanding the fact that the interpretation does not first arise in the context of an administrative claim for benefits. *See, e.g.*, *Worthy* v. *New Orleans Steamship Assoc.*, 342 F.3d 422, 427-28 (5th Cir. 2003) (deferring to ERISA trustee administrators' interpretation of trust language in a suit alleging that trust administrators violated their fiduciary duties); *Moench* v. *Robertson*, 62 F.3d 553, 566 (3d Cir. 1995) (holding that the courts must defer to

Given the multitude of contexts in which plan administrators are called upon to interpret plan terms outside of the administrative claims process, this case presents an issue that is likely to recur with great frequency.

2. This case, moreover, presents an issue of exceptional importance. ERISA regulates a voluntary regime that allows employers to decide whether to establish benefit plans and what kinds of benefits to provide. As this Court has recognized, a principle objective of ERISA is "the continuation and maintenance of voluntary private plans." *PBGC* v. *LTV Corp.*, 496 U.S. 633, 651 (1990) (quoting 29 U.S.C. § 1302(a)(1)). If employers are exposed to the frequent risk of unanticipated interpretations of their plans, they will be far less likely to offer such plans at all. *See Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996) (disfavoring rules that would "discourage employers from offering [ERISA] plans in the first place").

ERISA class actions seeking staggering sums of money based on unanticipated interpretations of plan language are becoming increasingly common.[11] *Firestone* deference is what protects employers from

---

reasonable plan interpretations in a case alleging breach of fiduciary duty).

[11] *See, e.g.*, *Young* v. *Verizon's Bell Atlantic Cash Balance Plan*, 575 F. Supp. 2d 892, 909, 912 (N.D. Ill. 2008) (applying deferential standard of review and thus upholding plan administrator's reasonable interpretation of pension plan on an issue involving "hundreds of millions of dollars").

the risk of such unanticipated and potentially disastrous interpretations of their benefit plans. The abuse of discretion standard of review articulated in *Glenn* thus "protects important values," including

> the plan administrator's greater experience and familiarity with plan terms and provisions; the enhanced prospects of achieving consistent application of those terms and provisions that results; the desire of those who establish ERISA plans to preserve at least some role in their administration; and the importance of ensuring that funds which are not unlimited go to those who, according to the terms of the plan, are truly deserving.

Evans v. *Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 323 (4th Cir. 2008). If the Second Circuit's decision cutting back *Firestone* deference goes uncorrected, that doctrine – and the important role it plays in encouraging employers to offer benefit plans at all – will be dramatically eroded.

3. The facts of this case vividly illustrate the problems that arise when *Firestone* deference is not applied to a plan administrator's interpretation of an ERISA plan. Here, as a result of the Second Circuit's failure to afford such deference, the Plan Administrator is subject to two different standards for administering the Xerox Plan adopted by two different courts.

In *Miller* v. *Xerox*, the Ninth Circuit held that the Plan Administrator of the Xerox Plan was "require[d]" to calculate the offset for the rehired employees who brought that action "based on the actual *actuarial equivalent* of the [prior lump sum] distribution" those employees received. *See* 464 F.3d at 875-76 (emphasis added). Here, the Plan Administrator interpreted the terms of the pre-1998 Plan to require precisely the same offset calculation that the Ninth Circuit held was required. (*See* Pet. App. 147a-52a.) The Second Circuit, however, rejected that interpretation. Instead it held that the Plan Administrator may offset a Respondent's benefit not by the present-day actuarial equivalent of his prior lump sum distribution but only by the *nominal* amount of that distribution. (*Id.* at 8a-9a.) Thus, contrary to the goal of uniform plan administration, the Plan Administrator cannot now employ a "set of standard procedures" in calculating benefits under the Xerox Plan. *Fort Halifax Packing Co., Inc.* v. *Coyne*, 482 U.S. 1, 9 (1987) ("The most efficient way [for a plan] to meet [its] responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.").[12]

---

[12] The decision of the District Court in this case also underscores the importance of deferring to plan administrators, who have greater familiarity with the plan's operations and who are expert in the complicated technical issues attendant to the administration of pension plans. Here, the District Court adopted an economically irrational interpretation of the Plan that even plaintiffs' own expert rejected as unreasonable. (*See* Pet. App. 156a-58a.) By offsetting Respondents' benefits only by

If allowed to stand, the Second Circuit's decision will strip countless other employers of the benefits of *Firestone* deference and expose them to the resulting risk of conflicting judicial interpretations of their benefit plans. Such a result would be fundamentally inconsistent "with nationally uniform plan administration," which is "[o]ne of the principal goals of ERISA." *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001); *accord Glenn*, 128 S. Ct. at 2354 (Roberts, C.J., concurring in part and concurring in the judgment) (noting that "certainty and predictability are important criteria under ERISA").

II. The Second Circuit Decision Conflicts with Authority from Other Circuits Regarding the Proper Standard of Appellate Review in Calculating Benefits Pursuant to Plan Terms.

It is well settled that appellate review of district court interpretations of written instruments, including ERISA plan documents, is *de novo*. Accordingly, the Second Circuit should have applied *de novo* review to the District Court's interpretation of the Xerox Plan – including *de novo* review of whether the District Court properly applied *Firestone* deference in this case.

---

the *nominal* amounts of their lump sum distributions, Respondents have been granted a windfall that is not available to other Xerox employees. This is because, as even Respondents' expert realized, the District Court's interpretation entirely ignores the time value of the money Respondents received ten or more years ago. (*Id.* at 156a-58a.)

Instead, the Second Circuit reviewed the District Court's interpretation of the terms of the pre-amendment Plan under a deferential "excess of allowable discretion" standard. (Pet. App. 8a.) In so doing, the Second Circuit broke with a number of other Circuits. Its decision, if upheld, will also frustrate the important ERISA goal of uniform and consistent plan interpretations. If the courts of appeals are required to affirm any "reasonable" plan interpretation offered by the district courts, neither plan administrators nor participants could ever be certain as to what a plan requires.

A. The Second Circuit Decision Creates a Circuit Conflict.

Abundant authority recognizes that appellate review of written instruments, including ERISA plan documents, is *de novo*. The Second Circuit held, however, that *de novo* review does not apply when a district court interprets a plan in the course of remedying "an identified ERISA violation." (Pet. App. 8a.) There is no basis for such an exception to the ordinary rule of *de novo* appellate review.

1. In *Frommert I*, the Second Circuit held that the "phantom account" offset provision was not properly added to the Plan until 1998 and therefore could not be applied to employees rehired before that time. It then remanded the case to the District Court with instructions to craft a "remedy . . . for those employees rehired prior to 1998 . . . utiliz[ing] an appropriate pre-amendment calculation to determine their benefits." (Pet. App. 51a.) In crafting a remedy on remand, the task of the District Court was to

determine the benefits due to Respondents "under the terms of the plan" (*id.* at 53a) – in other words, to interpret the pre-1998 terms of the Plan document. *See Firestone*, 489 U.S. at 115 ("[T]he validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue.").[13]

After the District Court issued its opinion construing the relevant Plan terms, Petitioners appealed to the Second Circuit. The Second Circuit stated that the "District Court had discretion to design a remedy to provide [Respondents] with the proper level of pension benefits in light of the ERISA violations" identified in *Frommert I*, and thus that it would review the District Court's "chosen remedy of an identified ERISA violation" only for "an excess of allowable discretion." (Pet. App. 8a.) Pursuant to that standard, the Second Circuit concluded that the District Court's chosen remedy was "one reasonable approach among several reasonable alternatives," and thus affirmed the District Court. (*Id.* at 13a-14a.)

2. The Second Circuit's application of an "excess of allowable discretion" standard of review directly conflicts with the venerable principle that "appellate

---

[13] The Second Circuit correctly recognized that this relief was to be awarded under ERISA § 502(a)(1)(B). (*Id.* at 53a-54a.) And it is clear that "nothing in [§] 502(a)(1)(B) supports damages beyond that section's language authorizing recovery of 'benefits due . . . under the terms of the plan.'" *Zimmerman* v. *Sloss Equip., Inc.*, 72 F.3d 822, 828 (10th Cir. 1995) (*quoting* 29 U.S.C. § 1132(a)(1)(B)).

courts have untrammeled power to interpret written documents." *Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157, 163 (2d Cir. 1947) (L. Hand, J.); *accord Barrett* v. *Safeway Stores, Inc.*, 538 F.2d 1311, 1313 (8th Cir. 1976) (same); *Emor, Inc.* v. *Cyprus Mines Corp.*, 467 F.2d 770, 773 (3d Cir. 1972) (same). Numerous courts of appeals have held that "an appellate court is not bound by a construction of a document based solely upon the terms of the written instrument." *FDIC* v. *Brants*, 2 F.3d 147, 150 (5th Cir. 1993) (quoting *In re Estate of Russell*, 444 P.2d 353, 362 (1968)); *accord NLRB* v. *Hobart Bros. Co.*, 372 F.2d 203, 206 (6th Cir. 1967) ("[T]he clearly erroneous rule does not prevent the Court of Appeals from construing a writing differently than the trial court's construction.").

Consistent with this authority, the Second Circuit had an obligation to determine whether – in light of the written terms of the Plan document – the District Court's interpretation of the Plan was *correct*, not merely whether it was "reasonable." Had the Second Circuit done so, Petitioners respectfully submit that it could not have affirmed the District Court's economically irrational Plan interpretation, which fails to give proper effect to the non-duplication of benefits provision, ignores the time value of money, and provides Respondents with an enormous windfall.[14]

---

[14] *See supra* n.12. An economically nonsensical interpretation of a plan that results in windfalls is unreasonable as a matter of law if there is any other plausible interpretation of the plan. *See, e.g., Lunn* v. *Montgomery Ward & Co., Inc.*, 166 F.3d 880,

The Second Circuit's decision conflicts not only with ample authority applying *de novo* review to a district court's interpretation of written instruments, but also with decisions that apply *de novo* review to district court calculations of ERISA benefits pursuant to plan terms. For instance, in *Welsh* v. *Burlington Northern, Inc., Employee Benefits Plan*, 54 F.3d 1331, 1335 (8th Cir. 1995), the Eighth Circuit considered whether a plan participant was entitled to disability benefits under the terms of a plan that did not grant the administrator interpretive discretion. After affirming the district court's conclusion that the plan administrator had improperly denied benefits to the participant, the Eighth Circuit considered whether the district court had properly construed the plan's terms in calculating the amount of benefits to which the participant was entitled. *See id.* at 1340-41. In doing so, the Eighth Circuit did not defer to the district court's interpretation of the plan but instead reviewed the terms of the plan in order itself to determine the benefits due. *See id.* In other words, the Eighth Circuit – in contrast to the Second Circuit – undertook a *de novo* review of the district court's remedies calculation.

The Court should grant certiorari to correct the Second Circuit's extraordinary departure from the settled principle that appellate review of written instruments is *de novo*. Indeed, given the clarity of the Second Circuit's error, summary reversal may be

---

882-83 (7th Cir. 1999); *Benefits Comm. of Saint-Gobain Corp.* v. *Key Trust Co. of Ohio, N.A.*, 313 F.3d 919, 932 (6th Cir. 2002).

appropriate. *See Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (summary reversal appropriate where the decision below is "clearly erroneous"); *see also Elder* v. *Holloway*, 510 U.S. 510, 516 (1994) (summarily reversing court of appeals' holding that a *de novo* standard of appellate review did not apply).

B. The Second Circuit Decision Presents a Recurring Issue of Exceptional Importance.

The Second Circuit held that it has no obligation to arrive at the correct interpretation of an ERISA plan (including a *de novo* determination of whether the plan terms require *Firestone* deference) in a large category of cases. Rather, in the Second Circuit's view, a court of appeals must defer to any "reasonable" interpretation of a plan offered by a district court in the course of determining the additional benefits due under the terms of the plan in the wake of an ERISA violation. This departure from traditional standards of appellate review exposes plan administrators to the untenable prospect that different district courts will adopt different interpretations of the very same ERISA plan.

For example, under the "allowable discretion" standard adopted by the Second Circuit, if two different district courts within the same Circuit adopt different interpretations of the same pension plan, the court of appeals must affirm both such interpretations if they are both within the "allowabl discretion" of the district court. This would eviscerate ERISA's fundamental goal of assuring consistent and

uniform administration of pension plans throughout the country. *See Egelhoff*, 532 U.S. at 148 ("One of the principal goals of ERISA is to enable employers to establish a uniform administrative scheme. . . ."); *Berger* v. *AXA Network LLC*, 459 F.3d 804 (7th Cir. 2006) ("uniformity of treatment" of plan participants is a "primary concern" of ERISA). Moreover, employers exposed to the prospect of conflicting and inconsistent interpretations of their benefit plans will be far less likely to offer such plans at all. *See Varity*, 516 U.S. at 497.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

MICHAEL D. RYAN
XEROX CORPORATION
45 Glover Avenue
Norwalk, CT 06856

MARGARET A. CLEMENS
NIXON PEABODY LLP
Clinton Square
P.O. Box 31051
Rochester, NY 14603

ROBERT D. WICK
Counsel of Record
RICHARD C. SHEA
ROBERT S. NEWMAN
CHRISTIAN J. PISTILLI
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

December 2008

Counsel for Petitioners

APPENDIX

Supreme Court, U.S.
FILED

08-810 DEC 23 2008

OFFICE OF THE CLERK

No. 08-

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,
Petitioners,

v.

PAUL J. FROMMERT, ET AL.,
Respondents.

On Petition For A Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL D. RYAN
XEROX CORPORATION
800 Long Ridge Road
Stamford, CT 06904

MARGARET A. CLEMENS
NIXON PEABODY LLP
Clinton Square
P.O. Box 31051
Rochester, NY 14603

ROBERT D. WICK
Counsel of Record
RICHARD C. SHEA
ROBERT S. NEWMAN
CHRISTIAN J. PISTILLI
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

Frommert v. *Conkright*, 535 F.3d 111 (2d Cir. 2008) 1a

Frommert v. *Conkright*, 433 F.3d 254 (2d Cir. 2006) 22a

Frommert v. *Conkright*, 328 F. Supp. 2d 420 (W.D.N.Y. 2004) 61a

Frommert v. *Conkright*, 472 F. Supp. 2d 452 (W.D.N.Y. 2007) 99a

Frommert v. *Conkright*, No. 07-0418, Order Denying Appellants' Petition For Rehearing Or Rehearing En Banc (2d Cir. Sept. 25, 2008) 129a

ERISA § 502(a)(1)-(3), 29 U.S.C. § 1132(a)(1)-(3) 132a

Xerox Corporation Retirement Income Guarantee Plan, 1989 Restatement 134a

Affidavit of Lawrence M. Becker, Xerox Corporation Retirement Income Guarantee Plan Administrator (dated June 26, 2006) 144a

Frommert v. *Conkright*, No. 00-CV-6311, Transcript of Proceedings (W.D.N.Y. July 11, 2006) 155a

APPENDIX

United States Court of Appeals, Second Circuit.

Paul J. FROMMERT, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillian, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski, Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Kenneth W. Pietrowski, Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Dennis E. Bains, Kathleen E. Hunter, John L. Crisafulli, Deborah J. Davis, Brenda H. McConnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin,

Claudette M. Long, Dale Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Carter, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Gail J. Levy, John A. Williams, Crystal Thorton, Charles R. Drannbauer, William M. Burritt, and Janice Ross Heiler, Plaintiffs-Appellees,

v.

Sally L. CONKRIGHT, Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, Xerox Corporation Pension Plan Administrator, Lawrence M. Becker, Xerox Corporation Plan Administrator, Xerox Corporation Retirement Income Guarantee Plan, and Xerox Corporation, a New York Corporation, Appellants, Defendant.

Docket No. 07-0418-cv.

Argued: June 19, 2008.

Decided: July 24, 2008.

Before: STRAUB and RAGGI, Circuit Judges, and SESSIONS, District Judge.*

STRAUB, Circuit Judge:

Plaintiffs-Appellees asserted claims under the

---

* The Honorable William K. Sessions III, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, against their current or former employer, Xerox Corporation ("Xerox"),[1] the pension plan administered for the benefit of its employees, and various individuals associated with the administration of that plan. On remand from our first decision in this litigation, *see Frommert v. Conkright*, 433 F.3d 254 (2d Cir.2006), the District Court crafted a remedy to address the ERISA violations we had identified and concluded that the release forms signed by several Plaintiffs-Appellees did not bar their ERISA claims, *see Frommert v. Conkright*, 472 F.Supp.2d 452, 456-59 (W.D.N.Y.2007). Defendants-Appellants challenge both aspects of the District Court's decision. For the reasons set forth below, we reject Defendants-Appellants' first challenge and agree with the second. Accordingly, we vacate a portion of the District Court's order and remand the case to the District Court for proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

We presume familiarity with the facts and procedural history of this case as set forth in our prior decision, *see Frommert*, 433 F.3d at 257-62, and we repeat them here only as relevant to the issues presented in this appeal. In that decision, we

---

[1] Early in this litigation, the District Court dismissed Xerox as a party, and Plaintiffs-Appellees did not challenge this dismissal in their appeal. *See Frommert v. Conkright*, 433 F.3d 254, 256 n. 2 (2d Cir.2006).

concluded that Defendants-Appellants had impermissibly amended the ERISA plan at issue through their method of determining retirement benefits for those beneficiaries who had previously left the company only to be rehired later. *Id.* at 264-68. When these beneficiaries left Xerox, they all received lump-sum distributions of their then-accrued pension benefits. *Id.* at 257.

The pension benefits of those who were subsequently rehired by Xerox were governed by a set of ambiguous provisions in the pension plan documents. The 1989 Xerox Retirement Income Guarantee Plan ("RIGP" or "Plan") provided that, "[i]n the event any part or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, ... and such member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution." 1989 RIGP § 9.6. The 1997 version of the Plan provided both that "[n]o credit shall be given [to a participating employee] for any period with respect to which a lump sum payment has been made ..." and that "Credit for Years of Participation preceding [such a payout] will be reinstated in the event that such an employee returns to Xerox." *Frommert*, 433 F.3d at 260. Thus, in determining these employees' benefits, the plan administrator was required to account, in a manner unspecified to employees, for both an employee's total years of service at Xerox and the fact that the final benefits must be "offset by" an amount "attributable" to a prior lump sum distribution.

The plan administrator resolved this difficulty by utilizing a so-called "phantom account" offset mechanism. The phrase "phantom account" refers to the calculation of the current value of the employee's prior, lump-sum distribution by adjusting that amount for "hypothetical investment gains and/or losses attributable to the prior distribution, as if the money had been left in [the employee's] account[ ]" instead of being distributed to the employee upon first leaving Xerox. *Id.* at 259 (quoting 1995 "Benefits Update"). In estimating the pension benefit to which that employee would be entitled upon his or her future retirement (and thus second separation) from Xerox employment, the plan administrator would both account for the employee's total years of service and deduct an amount based on the prior, lump-sum distribution, as augmented by the "phantom account" offset method. *See id.* at 259-61.

In our first decision, we concluded that the "phantom account" offset mechanism constituted a "retroactive cut-back" of anticipated pension benefits in violation of 29 U.S.C. § 1054(g), and that Defendants-Appellants had impermissibly amended the ERISA Plan to include that mechanism in violation of 29 U.S.C. § 1054(h). *See id.* at 266-68. We remanded to the District Court to fashion a remedy for these violations. *See id.* at 268. Specifically, we instructed the District Court as follows:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment

terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Id. In addition, we recognized that the District Court could apply the "phantom account" offset mechanism to employees hired after the 1998 amendment to the Plan because those individuals were on notice as to the mechanism's existence. *Id.* at 268-69. *But see Miller v. Xerox Corp. Retirement Income Guarantee Plan,* 464 F.3d 871 (9th Cir.2006) (holding that Plan's "phantom account" methodology itself violates ERISA), *cert. denied,*--- U.S. ----, 127 S.Ct. 1829, 167 L.Ed.2d 321 (2007).

Acknowledging our guidance to employ "equitable principles" and reviewing the language of the Plan materials, the District Court concluded that the appropriate remedy for employees hired before the 1998 amendment was to direct the plan administrator to pay each of these individuals "a lump sum in the amount of the difference between the amount of benefits that [an employee] has received, and the amount of the recalculated benefit, without any consideration of a 'phantom account.' "[2]

---

[2] The District Court presumed that the parties would be able to agree on which employees had full notice of the "phantom account offset" mechanism because they were rehired after the 1998 Summary Plan Description ("SPD") had been issued. *See Frommert v. Conkright,* 472 F.Supp.2d 452, 459 (W.D.N.Y.2007).

Frommert, 472 F.Supp.2d at 458 (internal quotation marks omitted). The District Court also stated that "it would not be unreasonable for the administrator to subtract out the amount of the prior distribution" in order to prevent such employees from receiving windfalls. *Id.* (alterations and internal quotation marks omitted).

In addition, the District Court concluded that the release forms signed by several Plaintiffs-Appellees in exchange for their receiving severance pay from Xerox did not release Defendants-Appellants from the ERISA-based claims asserted in this litigation. *See id.* at 460-65. Other matters addressed by the District Court on remand are not relevant to this appeal, which timely followed.

DISCUSSION

On appeal, Defendants-Appellants raise two challenges to the District Court's decision. First, Defendants-Appellants argue that the District Court fashioned an improper remedy for the ERISA violation associated with the implementation of the "phantom account offset" mechanism. Second, Defendants-Appellants argue that the District Court erroneously decided that the release forms signed by certain Plaintiffs-Appellees did not bar their ERISA-based claims. For the reasons that follow, we agree with Defendants-Appellants that the release forms at issue bar the signatories' ERISA claims, but we will not disturb the District Court's chosen remedy.

I. Remedy

On appeal, Defendants-Appellants challenge the District Court's remedy for the ERISA violations we identified in our prior decision, *i.e.*, the

impermissible amendment of the ERISA plan at issue to calculate Plaintiffs-Appellees' pension benefits according to a "phantom account" offset method. As discussed above, we instructed the District Court as follows:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Frommert, 433 F.3d at 268. We review a district court's chosen remedy of an identified ERISA violation for an excess of allowable discretion. *See Chao v. Merino,* 452 F.3d 174, 185 (2d Cir.2006).

Here, the Plan accounts for a retiring employee's total years of working at Xerox, but it also provides that an employee's benefits must "be offset by the accrued benefit attributable to [a prior distribution]." RIGP § 9.6. Plaintiffs-Appellees all received earlier, lump-sum distributions of their pension benefits when they first left their employment at Xerox, and the basic question presented to the District Court was how to ensure that these individuals received their due benefits in light of the ambiguous non-duplication of benefits provision. *See Frommert,* 472 F.Supp.2d at 457-58 (construing and applying § 9.6 of 1989 Plan). On remand, the District Court decided

that the appropriate remedy was to order the plan administrator to recalculate the relevant Plaintiffs-Appellees' benefits to deduct only the nominal value of their prior, lump-sum distributions, *i.e.*, without a "phantom account" adjustment reflecting hypothetical investment gains or, apparently, any other adjustment to reflect the inflation-adjusted values of the prior distributions. *See id.* at 458-59.

Defendants-Appellants fail to establish that the District Court's approach violated either the Plan terms or any law. Although Defendants-Appellants contend that the District Court failed to utilize pre-1998 Plan terms, the District Court explicitly did so but simply applied those terms to Plaintiffs-Appellees differently than Defendants-Appellants proposed. In advocating their proposed "new hire" approach instead of the remedy crafted by the District Court, Defendants-Appellants argue that § 1.44(f) of the 1989 Plan requires that a rehired employee who then retires is entitled only to a pension benefit that accounts for his or her years of service since being rehired; the prior years of service are relevant only for the purpose of "vesting." However, in advocating this "new hire" method, Defendants-Appellants ignore the terms of the 1989 Plan, which is silent as to prior lump-sum distributions pursuant to § 8.2. To the extent that the 1997 Plan applies to certain Plaintiffs-Appellees, Defendants-Appellants ignore the language of § 1.45(f). *See Frommert*, 433 F.3d at 258-60 (discussing such provisions in the various versions of the Plan). Defendants-Appellants have failed to demonstrate that the District Court exceeded its allowable discretion in crafting its chosen remedy instead of

adopting Defendants-Appellants' proposed approach.[3]

Alternatively, Defendants-Appellants contend that the District Court erred by failing to adopt the remedy proposed by the plan administrator or, at least, by failing to remand to the administrator the task of fashioning a remedy. Regarding the failure of the District Court to remand to the plan administrator, it does not appear from the record that Defendants-Appellants actually requested such relief from the District Court. As such, they have waived the issue for appeal. *See Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir.2005) ("It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal."(alterations and internal quotation marks omitted)).

Even if Defendants-Appellants had not waived the remand issue, we would review the District Court's

---

[3] Defendants-Appellants also argue that the District Court's remedy confers a "windfall" on Plaintiffs-Appellees in violation of equitable principles. *See, e.g., Prudential Ins. Co. v. S.S. American Lancer*, 870 F.2d 867, 871 (2d Cir.1989) ("[E]quity, we believe, abhors a windfall."). However, in contrast to *Prudential Insurance*, we do not view the remedy crafted by the District Court to be "wholly unjust" here because Defendants-Appellants wrote the terms of the ERISA Plan in an ambiguous and occasionally self-contradictory fashion. *Cf. Lifson v. INA Life Ins. Co. of N.Y.*, 333 F.3d 349, 353 (2d Cir.2003) (per curiam) (noting that, in interpreting an ERISA plan, a court "construe[s] ambiguities against the drafter and in favor of the beneficiary").

decision to fashion a remedy itself instead of remanding to the plan administrator for an excess of allowable discretion. *See Zervos v. Verizon N.Y., Inc.*, 277 F.3d 635, 648 (2d Cir.2002); *Kinek v. Paramount Commc'ns, Inc.*, 22 F.3d 503, 508 (2d Cir.1994). The District Court here did not exceed its allowable discretion in this regard. Although we did not prohibit the District Court from remanding the case to the plan administrator, the language in our prior opinion presumed that the District Court would craft the remedy itself. *See Frommert*, 433 F.3d at 268.

Moreover, Defendants-Appellants had ample opportunity to explain fully the approach proposed by the plan administrator before the District Court, and did so, in their briefs and at oral argument, in a sworn affidavit from the plan administrator, and in a written report and accompanying testimony from an independent actuary who analyzed the plan administrator's approach. Indeed, Defendants-Appellants identify nothing that might have been gained by the District Court's remanding the matter to the plan administrator. *See Krauss v. Oxford Health Plans, Inc.*, 517 F.3d 614, 630 (2d Cir.2008) (stating that plaintiffs were not entitled to administrative remand where doing so would have been "futile"); *Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir.1995) (stating that remand to a plan administrator is not required where such additional proceedings would be a "useless formality" (internal quotation marks omitted)). In addition, we suggested, as "guidance for the district court," that it "may wish to employ equitable principles." *See Frommert*, 433 F.3d at 268. Defendants-Appellants identify no equitable principles that a district court

might be employing, immediately upon remand from a circuit court, in merely performing the ministerial function of then remanding a case to an ERISA plan administrator.

Defendants-Appellants rely on *Miller v. United Welfare Fund* to argue that remand is appropriate when "reasonable minds could differ as to the outcome of the case." However, we directed the district court in *Miller* to remand the case to the plan administrator to permit the plan administrator to gather additional evidence relevant to the nursing care sought by the claimant. *See id.* Here, we did not anticipate any comparable, extensive fact finding, and none occurred on remand before the District Court. Indeed, the only "evidence" considered by the District Court consisted of expert testimony regarding which of various proposed remedies was the most fair and equitable. Given the apparent lack of any benefit to remanding the case to the plan administrator and the language in our prior decision implying that the District Court should fashion its own remedy, *see id.* at 268-69, we cannot conclude that the District Court exceeded its allowable discretion in actually doing so.

In the alternative, Defendants-Appellants argue that the District Court erred in failing to adopt the plan administrator's proposed approach, or at least consider it under a deferential standard of review. We have held that where the ERISA plan confers upon the plan administrator discretionary authority to "construe the terms of the plan," the district court should review a decision by the plan administrator under an excess of allowable discretion standard. *See Nichols v. Prudential Ins. Co. of Am.*, 406 F.3d 98,

108 (2d Cir.2005) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989)). However, the District Court here had no decision to review because the plan administrator never rendered any decision other than the original benefit determinations, all of which were premised on the now-impermissible "phantom account" offset mechanism. *See id.*("[W]e may give deferential review only to actual exercises of discretion."). Defendants-Appellants have identified no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA.

To the extent that Defendants-Appellants argue that the District Court erred by instructing the plan administrator to calculate benefits by deducting the nominal value of prior distributions denominated in 1980s dollars from accrued benefits denominated in current dollars, *see Appellants' Br.* at 38-41, we reject their argument for reasons similar to those applicable to their arguments on behalf of their own preferred "new hire" remedy. The District Court had discretion to design a remedy to provide Plaintiffs-Appellees with the proper level of pension benefits in light of the ERISA violations we identified in our prior decision. As Defendants-Appellants wrote a pension plan that addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence, we see no problem with the District Court's selection of one reasonable approach among several

reasonable alternatives. *Cf. Lifson v. INA Life Ins. Co. of N.Y.*, 333 F.3d 349, 353 (2d Cir.2003) (per curiam) (instructing that a court should construe ambiguities in plan terms against the drafter of the ERISA plan).

II. Releases of Certain Plaintiffs' ERISA Claims

The final issue raised in this appeal is Defendants-Appellants' argument that the District Court erred in ruling that the release forms signed by several Plaintiffs-Appellees did not apply to the ERISA claims asserted in this litigation.[4] The releases at issue provided that the signing employee "release[s] Xerox from any and all claims ... based on anything that has occurred prior to the date [he or she] sign[s] this Release" in exchange for up to fifty-two weeks of salary continuance. In addition, the form specifies several potential federal claims, including those based in ERISA, that the release covers.

As a threshold matter, Plaintiffs-Appellees argue, for the first time in this appeal, that Defendants-Appellants may not rely upon the release forms

---

[4] The District Court stated that twenty-two of the named Plaintiffs signed release forms, but that four of these amended their forms to carve out explicitly their claims as members of the "Frommert lawsuit" from the universe of claims to be covered by the release. *See Frommert*, 472 F.Supp.2d at 460. On appeal, Defendants-Appellants do not challenge the District Court's conclusion that these individuals' release forms did not cover their ERISA claims in this action. As a result, we will not disturb the District Court's conclusion that the release forms do not bar the ERISA claims asserted by these four Plaintiffs-Appellees in this litigation.

signed by several Plaintiffs-Appellees because Federal Rule of Civil Procedure 17(a) requires that an action in federal court "be prosecuted in the name of the real party in interest." Although Defendants-Appellants are the pension plan at issue in this litigation and its administrators, Plaintiffs-Appellees argue that only Xerox Corporation has a "sufficient stake in reversing the trial court's ruling that the Xerox general release form constitutes a waiver of ERISA claims by the releasee." *Appellees' Br.* at 39. As noted above, the District Court dismissed Xerox early in this litigation, and Plaintiffs-Appellees did not appeal this ruling. *See Frommert,* 433 F.3d at 256 n. 2. Moreover, Plaintiffs-Appellees did not challenge the authority of Defendants-Appellants to rely upon the releases below and thus have waived this argument for purposes of this appeal. *See Rogers v. Samedan Oil Corp.,* 308 F.3d 477, 482-84 (5th Cir.2002) (affirming district court's ruling that third-party defendant had waived real-party-in-interest defense by failing to assert it until the day before trial); *Richardson v. Edwards,* 127 F.3d 97, 99 (D.C.Cir.1997) (deeming real-party-in-interest defense waived when not raised until appellate proceedings).

Even if Plaintiffs-Appellees had not waived this argument, their real-party-in-interest argument is meritless because the release form itself defines its reference to "Xerox" to include " 'the Xerox employee benefit plans' " in which the employee had participated or was then participating. *See Frommert,* 472 F.Supp.2d at 460 n. 2 (quoting release forms). Moreover, Defendants-Appellants are not the parties *prosecuting* this action; that role

belongs to Plaintiffs-Appellees. *See* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1542 (2d ed. 1990) ("[T]he real party in interest principle ... directs attention to whether [the] plaintiff has a significant interest in the particular action he has instituted, and Rule 17(a) is limited to plaintiffs."). *Cf. Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 49 (2d Cir.2005) (holding that a Rule 17(a) defect may not be cured by the joinder, as nominal defendants, of the real parties in interest to the action where those parties have evinced no intention of prosecuting the action). Thus, Plaintiffs-Appellees' real-party-in-interest argument fails.

As to the merits of Defendants-Appellants' arguments regarding the releases, "an individual can waive his or her right to participate in a pension plan governed by ERISA only if his or her waiver 'is made knowingly and voluntarily.' " *Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir.1992) (quoting *Laniok v. Advisory Comm. of Brainerd Mfg. Co. Pension Plan*, 935 F.2d 1360, 1365 (2d Cir.1991)). We have articulated several factors as relevant to the determination of whether such a waiver is knowing and voluntary:

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, [as well as whether an employer encouraged the employee to consult an

> attorney and whether the employee had a fair opportunity to do so] and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.
>
> ... [T]his list of factors [is] not exhaustive....

Id.(internal citation omitted). A court should consider the "totality of the circumstances" in determining whether a waiver of ERISA rights is knowing and voluntary. *Id.*

Despite acknowledging the explicit and broad language in the release form, the District Court concluded that the instant ERISA claims were not covered due to perceived deficiencies related to "the clarity of the release and the consideration given by Xerox in exchange for the releases." *Frommert,* 472 F.Supp.2d at 461-62.Specifically, the District Court focused on one paragraph in which the signing employee agrees that "the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy." The District Court concluded that this language meant that the employee was not waiving his or her ERISA claim:

> The import of paragraph 5 is that the salary continuance given to the employee did not take the place of, but was in addition to, any benefits to which the employee was *already* entitled by law or Xerox policy. This suggests that the employee was not waiving his right to such benefits. If he were, it would make little sense to describe his salary continuance as being "in addition to" such benefits.
>
> ...

> Furthermore, while it might be argued that there is a distinction between a right to pension benefits in general and a "claim" seeking to have those benefits calculated according to a particular formula, that is a distinction without a difference here, because the Second Circuit has now held that, at least with respect to employees rehired before 1998, Xerox's "reduction of justified expectations of benefits [by using the phantom account] took the form of a retroactive cut-back in violation of" ERISA. In other words, those employees were "entitled by law" not simply to receive some pension benefits, but to have their benefits calculated without any reduction attributable to a "phantom" account.

Id. at 462 (footnote omitted; emphasis in original).

In reaching this conclusion, the District Court appears to have conflated the existence of consideration adequate to render a release enforceable with the scope of claims thereby released.[5] The paragraph on which the District Court

---

[5] The District Court also appears to have concluded that the releases failed to comply with a provision of the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f), and that such noncompliance has relevance to the determination of whether these Plaintiffs-Appellees released Xerox from ERISA-based claims. *See Frommert,* 472 F.Supp.2d at 463 n. 5.Section 626(f) specifies several facts that must exist in order to render waiver of claims asserted under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, both "knowing and voluntary." We need not and do not decide whether the release forms complied with the requirements of the OWBPA because such noncompliance, even if proven, is (continued...)

focused provided only that the consideration for the release, *i.e.*, the salary continuance, did not replace any benefits, including pension benefits, to which the employee was already entitled. However, there is no allegation that Defendants-Appellants violated this term of the contract by denying these Plaintiffs-Appellees any and all pension benefits to which they would have been entitled. To the contrary, counsel for Defendants-Appellants represented to this Court at oral argument that several of these Plaintiffs-Appellees had already received pension benefits, albeit calculated under the "phantom account" offset method.

At bottom, neither the uncertainty of such benefits at the time of release nor the fact that hindsight has revealed that such benefits are now worth more than the signing Plaintiffs-Appellees likely expected at that time can render these releases unenforceable. As the method used to calculate pension benefits for rehired employees was, and has continued to be, disputed throughout this litigation, the precise amount of benefits that an employee signing a release would have received in the absence of such a release was always indeterminate. Plaintiffs-

---

irrelevant to the question of whether a release of non-ADEA claims was "knowing and voluntary." *See Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 375 (5th Cir.2002) ("[T]he OWBPA ... applies only to ADEA claims."); *see also Tung v. Texaco Inc.*, 150 F.3d 206, 208-09 (2d Cir.1998) (per curiam) (concluding that plaintiff's waiver of his Title VII claims was knowing and voluntary despite the employer's noncompliance with § 636(f) requirements applicable to his ADEA claims).

Appellees who signed these releases did so before the District Court crafted its remedy for the ERISA violations we identified. The mere fact that the anticipated recovery associated with ongoing litigation is uncertain does not render an employee's release of claims asserted in that litigation unenforceable. *Cf. Anita Founds., Inc. v. ILGWU Nat'l Ret. Fund,* 902 F.2d 185, 189 (2d Cir.1990) ("[A] settlement payment, made when the law was uncertain, cannot be successfully attacked on the basis of any subsequent resolution of the uncertainty.").

Applying the factors we have articulated as relevant to the issue of whether a waiver of ERISA rights was knowing and voluntary and reviewing the undisputed facts pertaining to these releases under the totality of the circumstances, *see Finz,* 957 F.2d at 82, we conclude that the District Court erred in holding that the releases at issue were unenforceable. There appears to be no dispute that those Plaintiffs-Appellees who signed these releases had ample time (45 days) to decide whether to sign the release, that Xerox encouraged such individuals to consult an attorney, and that the signatories received salary continuances in consideration of their releasing claims. Some Plaintiffs-Appellees even modified the terms of the release forms with which they had been presented before signing them. As to the language of the releases themselves, we cannot conclude, as the District Court did, that the express terms of these releases were "at the very least ambiguous as to what the employee was giving up in exchange for salary continuance." *Frommert,* 472 F.Supp.2d at 462. As the District Court's

interpretation of the release forms is incorrect, it cannot stand. Unless the release form at issue specifically exempted this litigation as noted above, the releases signed by certain Plaintiffs-Appellees are enforceable.

CONCLUSION

For the foregoing reasons, we VACATE that portion of the order of the District Court holding that eighteen release forms are unenforceable, AFFIRM that portion of the order crafting a remedy for the identified ERISA violations, and REMAND the case for proceedings not inconsistent with this opinion.

United States Court of Appeals, Second Circuit.

Paul J. FROMMERT and Alan H. Clair Plaintiffs-Appellants, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napolean B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillian, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski, Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Kenneth W. Pietrowski, Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Kathleen E. Hunter, John L. Crisafulli, Deborah J. Davis, Brenda H. McConnell, Kathleen A. Bowen, Robert B. Carrando, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Sr., Claudette M. Long, Dale

Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Carter, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Gail J. Levy, John A. Williams, Crystal Thorton, Charles R. Drannbauer, William M. Burritt, Janice Ross Heiler, Thomas F. McGee, Vincent G. Johnson, F. Colt. Hitchcock, Ronnie Tabak, Martha Lee Taylor and Richard J. Glikin, Plaintiffs,

v.

Sally L. CONKRIGHT, Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, Xerox Corporation Pension Plan Administrator, Xerox Corporation, Lawrence M. Becker, Xerox Corporation Plan Pension Plan Administrator, Xerox Corporation Retirement Income Guarantee Plan and Xerox Corporation, a New York Corporation, Defendants-Appellees.

Docket No. 04-4609-CV.

Argued: July 11, 2005.

Decided: Jan. 6, 2006.

Before: POOLER and SACK, Circuit Judges, and GARAUFIS,[1] District Judge.

---

[1] The Honorable Nicholas G. Garaufis, United States District Court for the Eastern District of New York, sitting by designation.

GARAUFIS, District Judge.

Plaintiff-appellants appeal from a June 3, 2002 grant of partial dismissal and from a July 30, 2004 grant of summary judgment entered in the United States District Court for the Western District of New York (David G. Larimer, *Chief Judge*) in favor of Xerox Corporation ("Xerox")[2], the Xerox Corporation Retirement Income Guarantee Plan ("the Plan"), and individually named Plan Administrators dismissing the plaintiffs' claims for improper calculation of their benefits under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101 *et seq.* *Frommert v. Conkright,* 206 F.Supp.2d 435 (W.D.N.Y.2002) ("*Frommert 2002* "); *Frommert v. Conkright,* 328 F.Supp.2d 420 (W.D.N.Y.2004) ("*Frommert 2004* "). The central issue in this appeal is whether the manner in which the defendants instituted a "phantom account" offset, through which the hypothetical growth of an employee's previous lump sum retirement benefits distribution is factored into his current benefits calculation, violates ERISA. We hold that it does.

For the reasons set forth below, we find that the Plan has not always contained a phantom account, that it was not properly added to the Plan through amendment until 1998, that its application to employees rehired prior to 1998 violates ERISA's anti-cutback provision by impermissibly reducing their benefits, and that its adoption in 1998 was

---

[2] Xerox was dismissed as a defendant in the first of the district court's rulings. Plaintiff-appellants do not appeal this dismissal.

made without proper notice to Plan participants. We also conclude that in light of our view of the applicable law set forth below, the district court should reassess whether the plaintiffs have stated a claim for equitable relief concerning their allegations that the defendants breached their fiduciary duties by misrepresenting the terms of the Plan. We therefore vacate the district court's decision granting summary judgment to the defendants and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Plaintiffs are a group of over 100 Xerox employees who left the company at one time or another and were subsequently rehired. At the time of their initial departure from Xerox, they received lump-sum distributions of the retirement benefits they had earned to date. Upon being rehired by Xerox, they once again began to earn retirement benefits under the Plan. The dispute in this case centers on the manner by which the rehired employees' previous distributions are factored into the calculation of their retirement benefits after returning to Xerox.

Under Xerox's retirement plan, a retiring employee's benefits are determined by looking to the highest result of three alternative calculation methods. *See Layaou v. Xerox Corp.*, 238 F.3d 205, 206 (2d Cir.2001). The first of these methods is the retirement plan formula ("RIGP"), which is calculated by multiplying years of service, up to thirty, by 1.4 percent of the highest-average yearly pay, a figure based on the average of the employee's five highest-paying calendar years with Xerox. For employees rehired by Xerox, the number of years of service includes the total time the employee worked

for Xerox, not just the period of employment following rehire.

Second, the Plan looks to the employee's Cash Balance Retirement Account ("CBRA"), which consists of yearly contributions by Xerox of an amount equal to five percent of the employee's salary. This account accrues interest at a yearly fixed rate of one percent above the one-year Treasury Bill rate. For employees who commenced working at Xerox before the end of 1989, the CBRA account also includes the transferred balance of a Profit Sharing Retirement Account that Xerox maintained for each employee until December 31, 1989. According to the record, the transferred balance for the plaintiffs was $0 because they had withdrawn the balance of their accounts when they originally retired from Xerox.

The third and final method of calculation is called the Transitional Retirement Account ("TRA") and is only available to employees hired by Xerox prior to 1989. It consists of the balance, if any, that an employee had in the Retirement Account as of December 31, 1989, plus hypothetical gains based on the investment results of the funds in which the employee's Profit Sharing Retirement Account were invested as of that date.

In order to avoid paying duplicative benefits to rehired employees who had previously received a lump sum distribution, the Plan has always contained provisions concerning the offset of prior distributions. Without such provisions, rehired employees would receive a windfall upon their second departure from Xerox because they would receive benefits based on their initial tenure at the company on two separate occasions. It is the manner

by which the offset of prior distributions is applied, along with the means by which it was incorporated into the Plan, that are the central subjects of dispute in this case.

The Plan's 1989 Restatement reflects a significant redesign of the pension benefit scheme previously employed by Xerox. Most notably, the Plan eliminated the Profit Sharing Plan and transferred balances within it to employees' TRA and CBRA accounts. Before 1989, TRA and CBRA accounts did not exist. The Plan provided for an individual to have a retirement account and also included a calculation somewhat similar to the RIGP formula described above (total years of service multiplied by percentage of average monthly compensation). The main difference, however, was that, in determining benefits, the Plan did not compare the monthly value of the RIGP calculation to the monthly value of the individual's retirement account. Instead, to determine benefits, a certain percentage of the individual's retirement account was deducted from the RIGP to offset the earlier lump-sum distribution.

The 1989 Restatement also contained provisions regarding the non-duplication of benefits for plan participants, who are referred to as "Members." In particular, Section 9.6 of the Restatement provided as follows:

Nonduplication of Benefits. In the event any part of or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, if Section 8.8 [dealing with incompetent beneficiaries] does not apply to such distribution and such Member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based

on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

The term "Accrued Benefit" as used in Section 9.6 is defined in Section 1.1 of the 1989 Restatement in pertinent part as follows:

The normal retirement benefit which a Member has earned up to any date, and which is payable at Normal Retirement Date in an amount computed in accordance with ... [Section] 4.3, based, however, only upon Average Monthly Compensation received and Years of Participation rendered by a Member up to the date as of which the Accrued Benefit is computed ...

Of further relevance concerning the non-duplication of benefits is Section 1.44 of the Restatement, concerning "Years of Participation." Section 1.44f provides: "No credit shall be given for any period with respect to which a lump sum payment has been made under Sections 8.5 and 8.8." Section 8.5 addresses lump sum distributions of benefits of the type received by the plaintiffs, while Section 8.8 deals with an issue unrelated to this case-the procedures to be followed if a plan participant or her spouse are adjudged incompetent.

As the defendants conceded at oral argument, as well as in their submissions to the Court[3], the 1989 Restatement did not specify how the Plan would

---

[3] *See, e.g.*, Defendants-Appellees' Brief at 35 (indicating that "the initial draft of the 1989 Restatement did not specify how to account for the prior distributions of the newly created CBRA and TRA accounts").

account for the prior distributions of the newly created CBRA and TRA accounts, and, more significantly, made no mention of the phantom account offset or the fact that the hypothetical increased value of the prior distribution would be factored into the calculation of a rehired employee's benefits. The defendants, however, contend that a series of subsequently issued changes and clarifications provided notice of the existence of the phantom account to Plan participants and sufficient explanation of the manner in which it functions.

On April 2, 1990, the defendants issued two changes to the Plan's text without prior notice to Plan participants. The April 2 changes added language to the definitions of the CBRA and TRA accounts to allow offsets for distributions made after these accounts were included in the Plan. Notably, the only reference to the treatment of prior lump sum distributions from the then-defunct Retirement Account related to when a plan participant had been the subject of a qualified domestic relations order. The other significant change affected Section 4.3 and provided that a Plan participant was entitled only to the larger of the RIGP benefit or the monthly benefit based on her CBRA and TRA account balance, if any.

The Plan's 1993 Restatement changed Section 1.44f, now titled Section 1.45f, and added two additional sentences. In the 1989 Restatement, Section 1.44f read: "No credit shall be given for any period with respect to which a lump sum payment has been made under Sections 8.5 or 8.8." This language was modified in Section 1.45f of the 1993 Restatement to provide:

No credit shall be given for any period with respect

to which a lump sum payment has been made under Section 8.2, 8.5 or 8.8. Credit for Years of Participation preceding a payment under Sections 8.5 and 8.8 will be reinstated if a Member again becomes an Active Member. The benefit payable under this Plan to such Member who has received a prior distribution will be reduced by the previously distributed amount with adjustments to the "relevant time" under Section 1.9 [CBRA]1.41 [TRA], or at the time of the subsequent distribution under Section 4.2 [formerly Section 4.3].

Section 8.2 deals with payments or distributions of the type received by the plaintiffs.[4] Thus, its inclusion within Section 1.45f meant that the type of distributions made to the plaintiffs were brought within the scope of Section 1.45f's coverage. However, because Section 8.2 is omitted from the second sentence of 1.45f, the distributions provided under Section 8.2 are, by the terms of the Plan, excluded from reinstatement if an employee is rehired.

In 1995, the defendants issued a "Benefits Update" summarizing changes made to the Plan since the issuance of the 1993 Restatement and offering "clarification of key points about the plans." Among these clarifications was a description of the manner in which the phantom account offset functioned. This

---

[4] Section 8.5 of the 1993 Restatement concerned distributions under $3,500, while Section 8.8 continued to address procedures for the payment of pension benefits to incompetent or minor plan participants or beneficiaries.

explanation read as follows:

It is important to note that if you have received a prior distribution from the plan, this will affect the calculation of your benefit. In calculating your RIGP benefit for the purpose of determining the highest of your TRA, CBRA, or formula benefit, the amount of your prior distribution will be added to your TRA and CBRA accounts, along with hypothetical investment gains and/or losses attributable to the prior distribution, as if the money had been left in your accounts. However, since you already received the prior distribution and there were no actual investment gains and/or losses on this amount, the payment of your RIGP benefit will not include the prior distribution or any hypothetical investment gains and/or losses.

In the 1996 Restatement, the language of 1.45f remained substantially unchanged. However, on July 9, 1997, the Plan administrators issued a document altering the language of 1.45f of the 1996 Restatement to include Section 8.2 within the second sentence: "No credit shall be given for any period with respect to which a lump sum payment has been made under Sections 8.2 and 8.5. Credit for Years of Participation preceding a payment under Sections 8.2 and 8.5 will be reinstated if a Member again becomes an Active Member." This change had the effect of including the prior lump sum distributions under 8.2 into consideration of the accrual of rehired employees' benefits.

Xerox's benefits department distributed an internal memorandum dated May 21, 1997 in advance of a "communication" distributed to rehired employees entitled "Important Information For Rehired

Employees Regarding Your RIGP Benefits." The internal memorandum advised that the communication was intended to "help reinforce employees' understanding of prior distributions under the Xerox Retirement Income Guarantee Plan (RIGP)." The communication itself indicated that it was provided to supplement the prior distribution explanation provided in the 1995 Benefits Update and "clarify how your prior distribution will affect future benefits payable to you under the plan."

As the plaintiffs concede, the details of the phantom account offset functions were set out in full in the 1998 Summary Plan Description ("SPD"). The SPD explained: "Your future RIGP benefit must take into account the current value of this prior distribution, as if it had remained in your account and experienced investment results. This ensures the same retirement funding levels for all employees-whether or not they had taken a prior distribution." The SPD also explained in some detail the mechanics of the three-step process by which the phantom account is factored into benefit calculations. First, the present value of any of the employee's accounts are calculated as if the lump sum had remained in the account and been invested throughout the period following distribution. Second, the current values of the CBRA and TRA that previously were distributed (i.e., the estimated values) are added to any actual amounts earned since the employee's rehire date.[5]

---

[5] The RIGP benefit is not subject to the same estimation process because it is based strictly on the formula of the employee's average salary and years of service. This is because there is no (continued...)

Using these total amounts, a comparison is made among the three account values-RIGP, total CBRA, and total TRA-to determine which method yields the greatest benefits in a monthly value. Third, the account with the greatest monthly value is reduced by the current value of the employee's prior distribution in that same account.[6]

The 1998 Restatement also contained language addressing the fact that a rehired employee's CBRA and TRA accounts will be offset by the hypothetical growth of previous distributions. The sections defining the CBRA and TRA both provided that when a rehired employee's benefits are calculated these accounts will be treated as if they contain the previous distribution made to the plan participants as "it would have increased [had it remained invested] during the period from the time of the distribution to the relevant time."

---

actual account balance for the RIGP at the second date of termination, and there also is no current value of prior distribution. Thus the phantom account offset is applied to the RIGP value only by way of comparison with the CBRA and TRA account values. *See* Plaintiffs-Appellants' Brief, Appendix Vol. V, at A-1522-1525.

[6] Because the RIGP account does not undergo the same estimated appreciation as the TRA and CBRA accounts, *see* n. 4 *supra*, there is no phantom account value to offset in this third stage. Instead, when the RIGP formula provides the greatest potential value, the second highest value (either the TRA or CBRA) is subtracted out from the RIGP value to yield an actual monthly benefit rate. *See* Plaintiffs-Appellants' Brief, Appendix Vol. V, at A-1525.

The experience of plaintiff Paul Frommert demonstrates the manner in which the use of the phantom account was both disclosed and utilized. Frommert worked at Xerox from 1960 until January 1986, when he received a lump-sum payment of $147,780.[7] Frommert was then rehired by Xerox in November 1989. In 1996, Frommert received a document from Xerox entitled "Value Added: Your 1996 Total Pay Statement" informing him that under the RIGP formula, the monthly benefit he had earned to date, payable at age 65, was $2,842 per month. The "Value Added" statement also provided the following information regarding the RIGP benefit: "Your benefit will grow with your service and earnings. It will be reduced if you've had a prior distribution ..." (emphasis in original). In a footnote, it was also noted that the current value of prior distributions, taking into account hypothetical gains, would be used "in calculating your RIGP benefit for the purpose of determining the highest of your TRA, CBRA, or formula benefit."

On May 29, 1996, however, Frommert received a "Projected RIGP Calculation" that took into account the phantom account offset and estimated his benefit at only $5.31 a month. This value was arrived at using total TRA and CBRA balances of $504,737 and $415,394 that included the hypothetical growth of the phantom account. Because the TRA value was higher than the CBRA value, it was used to calculate the monthly benefit, which came out to $3,125. The

---

[7] Unless otherwise indicated, all dollar figures are rounded to the nearest dollar.

TRA monthly value was then compared to the RIGP monthly value of $2,482 and because it was larger, it was adopted as the benefit payment method. But to determine the *actual* monthly amount Frommert was to receive, the phantom account offset still had to be deducted from the TRA monthly amount. The current monthly equivalent of the prior distribution was determined to be $3,120. After deducting this amount from the total TRA monthly benefit of $3,125, Frommert was left with a $5.31 monthly pension benefit.

Upon learning of his expected level of benefits based on the inclusion of the phantom account, Frommert sent a memorandum to Patricia Nazemetz, Director of Benefits at Xerox. Frommert indicated that learning his expected benefits were only $5.31 per month "came as a shock since I believed the number in the value added statements year over year." Xerox construed Frommert's memorandum as a request for additional benefits, which it denied in an October 14, 1996 memorandum. Xerox's memorandum explained that "based upon the RIGP Plan Document as written, upon retirement, you are entitled to the higher of your RIGP Formula Benefit, your TRA or your CBRA. However, your TRA and CBRA accounts must take into consideration your prior distribution (including investment results) as if it had never the left plan." Frommert was also informed that he could request that the Plan Administrator review the denial of additional benefits. Frommert subsequently appealed the denial of benefits. That appeal was denied on November 26, 1999.

On November 24, 1999 the plaintiffs commenced this lawsuit in the Western District of New York. The

defendants moved for dismissal of a number of the plaintiffs' claims and, in a decision dated June 3, 2002, the district court granted the motion in part by dismissing a number of counts, one cause of action under ERISA, and Xerox as a defendant. The defendants subsequently moved for summary judgment and plaintiffs Paul Frommert and Alan Clair cross moved for summary judgment. In a decision dated July 30, 2004, the district court denied the plaintiffs' cross-motion and granted the defendants' motion in its entirety, thereby dismissing the complaint.

Plaintiffs now appeal the district court's grant of summary judgment along with the district court's decision to dismiss their claim for equitable relief pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a).

II. DISCUSSION

We review the district court's determinations on motions to dismiss and summary judgment *de novo*. *See, e.g., Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir.2003). In reviewing the grant of a motion to dismiss, we must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir.2002). "The court may not dismiss a complaint unless it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." *Jaghory v. N.Y. State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir.1997) (internal quotation marks omitted). Summary judgment is appropriate only where the moving party has demonstrated that there are no disputed issues of fact and the moving party is

entitled to judgment as a matter of law. *Miller*, 321 F.3d at 300.

A. The Phantom Account-Effect and Implementation

"There is no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743, 124 S.Ct. 2230, 159 L.Ed.2d 46 (2004). Here, that objective was thwarted up until 1998 because the defendants attempted to implement the phantom account offset without properly amending the terms of the Plan or providing adequate notice to rehired employees that their benefits would be reduced because of the hypothetical growth attributed to their prior lump sum distributions. Without the benefit of such information, former employees contemplating returning to Xerox were denied the opportunity to make a meaningful decision regarding whether they would accept the terms of Xerox's pension plan. Not until 1998, when the phantom account was fully explained in an SPD, was the text of the Plan amended and adequate information provided to former Xerox employees concerning the treatment of their previous distributions. Such belated disclosure of so significant a change cannot be squared with ERISA's mandate.

At the outset, we pause to define what it means to "amend" a plan under ERISA. We do so because of the crucial role that this definition will have in determining (1) whether Plan participants received timely notice of the amendment and (2) which Plan participants may be bound by the amended Plan. Both the district court and the defendants view an

amendment as occurring simply when the plan administrators change the operation of the plan. We, however, look to the plain meaning of the term and define an "amendment" to a plan as taking place at the moment when employees are properly *informed* of a change. Because we conclude that an ERISA "amendment" to a plan occurs only when the plan's employees are informed of a change in the text of the plan, the defendants' argument that an amendment may be made by plan administrators changing the operation of the plan has no merit.

Two ERISA provisions are also of central importance in analyzing the legitimacy of the phantom account offset at issue here. Congress adopted these provisions to safeguard benefits that have been promised to employees. First, ERISA's anti-cutback rule protects employees' expectations in their accrued benefits. It provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1).[8] Second, under ERISA § 204, plan sponsors are prohibited from amending a plan in a way that reduces future benefit accrual without proper notice to plan participants. Section 204(h), as then constituted, provided as follows:

---

[8] Section 204(g)(1) contains two exceptions not applicable here-allowing the reduction of accrued benefits by amendment where a place faces "substantial business hardship," 29 U.S.C. § 1082(c)(8), and where terminated multiemployer plans are involved, § 1441.

(h) Notice of significant reduction in benefit accruals

(1) A [pension] plan ... may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to-

(A) each participant in the plan ...

29 U.S.C. § 1054(h) (2000).[9]

The district court denied the plaintiffs relief under both of these provisions, finding: (1) that the phantom account did not actually reduce the plaintiffs' accrued benefits; (2) that the plan that controls an employee's benefits is the one in effect at the time of the application for benefits; (3) that the Plan had always provided for the use of the phantom account offset; and (4) that, even if the phantom account did reduce the plaintiffs' benefits, they received sufficient "tardy" notice under § 204(h). We disagree with each of these conclusions and find, as a matter of law, that the phantom account was not part of the Plan until 1998 when it was added by amendment of the Plan's text through its explanation in the 1998 SPD. Based on this finding, we hold that application of the phantom account by the defendants prior to its inclusion in the Plan by amendment constituted a prohibited reduction of

---

[9] Section 204(h) was amended in 2001. *See* Pub.L. 107-16, § 659(b).

justified expectations of rehired employees' accrued benefits in contravention of § 204(g).[10] We also hold that the defendants failed to meet their obligations to provide advance notice of the amendment as required by § 204(h), meaning that the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD. However, for employees rehired subsequent to the amendment of the Plan through the 1998 SPD, the phantom account is a component of the Plan that they joined and thus may permissibly be applied to them.

1. Origins of the Phantom Account

The initial question before us is whether the application of the phantom account represents an amendment to the Plan. Because ERISA does not set the level of benefits that a plan must provide, *Lockheed Corp. v. Spink,* 517 U.S. 882, 887, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996), the use of the phantom account is problematic only if it represents an impermissible amendment to the terms of the Plan. *See* ERISA § 204(g)-(h), 29 U.S.C. § 1054(g)-(h). That is, if the phantom account has always been a part of the Plan, as the defendants contend, then its application to the plaintiffs does not constitute a new occurrence subject to challenge under § 204(g), nor would it violate § 204(h) because there would have been no amendment.

The district court upheld the validity of the phantom

---

[10] We do not reach the issue of the plaintiffs' anti-forfeiture claim under ERISA § 203(a)(2), 29 U.S.C. § 1053(a)(2), because we find that it is duplicative of their anti-cutback claim.

account in part because it erroneously concluded that the controlling plan for the purpose of determining benefits is the one in effect at the time of an employee's application for benefits. *See Frommert 2004,* 328 F.Supp.2d at 431. Although this is true for welfare benefit plans, it is not the case where, as here, pension benefits are involved. *See Moore v. Metro. Life Ins. Co.,* 856 F.2d 488, 491 (2d Cir.1988) ("ERISA regulates pension plans far more extensively than welfare plans. For example, welfare plans are expressly exempted from the Act's detailed minimum participation, vesting and benefit-accrual requirements ..."); *Owens v. Storehouse, Inc.,* 984 F.2d 394, 397-98 (11th Cir.1993) ("ERISA does not prohibit a company from terminating previously offered benefits that are neither vested nor accrued. Unlike pension benefits, welfare benefit plans neither vest nor accrue.") (internal citation omitted); *see also* J. Langbein & B. Wolk, *Pension and Employee Benefit Law* 160 (3d ed. 2000) ("Langbein & Wolk") ("ERISA's vesting and benefit accrual rules apply to pension plans, but not to welfare benefits plans."). The reason that a later-adopted plan cannot be applied to reduce already-earned pension benefits is that these benefits are protected by ERISA's vesting and accrual provisions. *See* ERISA § 203-204, 29 U.S.C. § 1053-1054. Absent such requirements, ERISA would provide minimal protection for employees who would lack any certainty that the benefits they expected to receive upon retirement would actually be available to them and not be eliminated by the later adoption of a less favorable plan. Because ERISA does not contemplate such an approach of substituting the terms of later plans for the purpose of calculating accrued benefits upon

retirement, if the phantom account is to be considered part of the Plan, then there must be another means by which this can occur.

In this regard, the defendants contend, and the district court agreed, that the phantom account has always been part of the Plan. Despite its absence from the 1989 Restatement, which both the defendants and district court acknowledge, the defendants argue that the Plan contained the phantom account both before and after the 1989 Restatement. Specifically, the defendants contend that the phantom account was present in versions of the Plan prior to the 1989 Restatement and that its omission from the 1989 Restatement was rectified by the changes made to the Plan in 1990 and through subsequent disclosures regarding how the Plan functions. Further, the defendants argue that because the 1989 Restatement contained a nonduplication provision, its only flaw was that it lacked sufficient details concerning how this nonduplication would occur-through the phantom account. They argue that this oversight was quickly rectified by changes to the Plan that clarified that the phantom account would be the means of ensuring nonduplication in sufficient detail to apprise Plan participants of its existence along with later SPDs detailing the manner in which it functions. Implicit in this approach is an assumption that material terms of a plan may be omitted from a plan for significant periods only to surface later and be given binding effect for the period prior to their absence. We do not share this view.

This Court has previously considered the effectiveness of the Plan's purported disclosures of

the phantom account to employees through its SPDs, and found them to have been wanting. *See Layaou,* 238 F.3d at 209-212. The defendants take pains to distinguish this case from *Layaou* on the grounds that *Layaou* involved a challenge under a different provision of ERISA, and that Layaou retired prior to the full disclosure of the mechanics of the phantom account. However, they cannot overcome *Layaou* 's significance for this case. We view *Layaou* as having settled the question of whether the Plan had sufficiently disclosed the existence and mechanics of the phantom account at any point before 1994.

Like the plaintiffs here, Layaou had previously been employed by Xerox and taken a lump-sum distribution at the time of his first separation from Xerox. *Id.* at 206. Layaou was rehired in 1987 and subsequently retired in 1995, when the phantom account was applied to his benefit calculation and reduced his expected benefits from $924 under the RIGP formula to $124 under the CBRA. *Id.* at 207. The only notice that Layaou had received concerning the non-duplication of his benefits was contained in Xerox's annual SPD, which simply provided that "[t]he amount you receive may also be reduced if you had previously left the Company and received a distribution at that time." *Id.* at 210. Nowhere did the SPD address the issue of a phantom account or explain that Layaou's benefits would be offset by a hypothetically appreciated value of his prior lump-sum distribution. *Id.* As a result, we held that the Plan violated ERISA's SPD requirement, 29 U.S.C. § 1022, by failing to "provide notice to Layaou and other similarly situated employees that their future benefits would be offset by an appreciated value of

their prior lump-sum benefits distributions." *Id.*

Even though the instant case does not involve a challenge under § 1022, the holding in *Layaou* is of significance here because of the central role that the SPD plays in communicating the terms of a plan to its members. "ERISA 'contemplates that the summary [plan description] will be an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary." *Layaou,* 238 F.3d at 209 (quoting *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907 (2d Cir.1990)) (alteration in *Layaou*). Further, the SPD is of such importance that "where the terms of a plan and the SPD conflict, the SPD controls." *Burke v. Kodak Ret. Income Plan,* 336 F.3d 103, 110 (2d Cir.2003); *see also Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 135-36 (2d Cir.1999) ("Employers are bound by promises made in SPDs, which Congress intended to be a primary source of information regarding plan benefits."). Since the terms of the phantom account were neither included in the 1989 Restatement nor included in the Plan's SPDs up through 1994, we disagree that the Plan has always contained the phantom account or that its existence was adequately disclosed. It is clear, under either an arbitrary or capricious standard or as a matter of law, that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable.[11]

---

[11] It is not settled whether a *de novo* or arbitrary and capricious standard of review applies. In *Layaou*, the court found "as a matter of law, that the SPD failed to provide notice to Layaou (continued...)

Because we find that the Plan did not always include the phantom account, it follows that the various changes, updates and explanations from the Plan regarding the existence and nature of the phantom account are not mere clarifications of an existing policy. Rather, they had the effect, whether deliberate or unintentional, of engrafting the phantom account onto the Plan without actually amending its text.

2. Amendment of the Plan to Include the Phantom Account

Having considered and rejected the defendants' other arguments in favor of the lawfulness of the phantom account, we are left only to consider whether the phantom account was adopted pursuant to a valid amendment of the Plan. The district court found that the Plan was validly amended by 1995 when the

---

and other similarly situated employees that their future benefits would be offset by an appreciated value of their prior lump-sum benefits distributions." *Layaou*, 238 F.3d at 210. The *Layaou* court further stated that the plan administrator's interpretation that the plan always included the phantom account was unreasonable "under either an arbitrary and capricious or de novo standard of review" and noted that "[i]n reaching this conclusion, we express no view on whether the deferential standard of review for a plan administrator's interpretation of a plan under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), is applicable to a plan administrator's interpretation of an SPD, where it has been determined that the SPD violates the disclosure requirements of 29 U.S.C. § 1022." *Id.* at 211-12. Here, as in *Layaou*, we find the Plan Administrator's conclusion to be unreasonable under either standard.

Benefits Update, which explained in some detail how the phantom account functions, was issued. It reasoned that even if prior notice was not given, by 1995 the plaintiffs received sufficient "tardy notice" of the phantom account offset to satisfy the requirements of § 204(h). *Frommert 2004,* 328 F.Supp.2d at 435-36. This conclusion was based in part on the court's rationale that the plaintiffs could not demonstrate that they had suffered any prejudice as a result of the imposition of the phantom account, which the district court concluded was demonstrated by the fact that they had all decided to remain at Xerox even after disclosure of the phantom account offset and its effects. *Id.* at 436.

Section § 204(h), as it then existed, clearly required the Plan administrators to provide fifteen days advance notice of any amendment creating "a significant reduction in the rate of *future* benefit accrual." ERISA § 204(h), 29 U.S.C. § 1054(h) (emphasis added); *see also Prod. & Maint. Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1404 (7th Cir.1992) ("Section 204(h)'s language is also clear and imperative: a plan 'may not be amended' absent proper notice."). Allowing "tardy notice" several years after the effective date of an amendment to stand in for the advance notice that is actually required under § 204(h) upends the purpose of the provision by turning "future benefit accrual" into past accrual. Under the district court's approach, by the time the plaintiffs learned of the phantom account, some of them had already experienced at least five years-from the 1989 Restatement until the 1995 Benefits Update-of significantly reduced benefit accrual. As a result,

they were deprived of the opportunity to take timely action in response to the purported "amendment." Such action might have included seeking injunctive relief, altering their retirement investment strategies, or perhaps considering other employment.

That the plaintiffs remained employed at Xerox after belatedly learning of the effects of the phantom account cannot excuse the Plan's attempts to impermissibly amend the Plan. Contrary to the defendants' arguments and the district court's conclusion, the fact that the plaintiffs remained in Xerox's employ does not demonstrate that they suffered no prejudice through the purported adoption of the phantom account offset. Imposing a requirement that plan participants must show actual prejudice from a challenged plan amendment by terminating their employment imposes an unduly harsh burden on dissatisfied plan participants. This Court has rejected such a standard in the context of plan participants challenging deficient SPDs. *Burke*, 336 F.3d at 112. Rather than showing actual prejudice, we held that plan participants must demonstrate that they were "likely to have been harmed" by the faulty SPD. *Id.* at 113. In this case, we find that the plaintiffs have met this standard. The prolonged absence of any mention of the phantom account from Plan documents, most notably SPDs, likely, and quite reasonably, led plan participants to believe that it was not a component of the Plan. Rather, rehired employees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received.

While an employer may rebut a showing of likely

prejudice by demonstrating that the deficiency was in fact a harmless error, *id.*, that has not occurred here. The assumption that the employees were not prejudiced because they remained in their positions after learning of the phantom account does not lead to the conclusion that it was merely a harmless error. In fact, such a conclusion can only be reached if all of the other important aspects of a job are put to the side and pension benefits are made the determinative factor in whether a position is desirable. While there is no doubting the importance of achieving security for retirement, many other weighty considerations bear on the decision whether to continue or terminate employment, including salary, seniority, and, not least of all, job satisfaction. In this case, these considerations are particularly relevant where purported notice of an amendment came some five years after the effective date of the purported amendment. In the interim, the plaintiffs continued to be employed by Xerox and presumably reaped the attendant benefits of prolonged employment, such as increasing seniority, responsibility and salary. Thus it cannot be reasonably concluded that the plaintiffs somehow waived their right to object to the surreptitious imposition of the phantom account by remaining at Xerox.

We also disagree with the district court's conclusion that the 1995 Benefits Update effectively amended the terms of the Plan. While the substance of the Benefits Update made clear the "full import" of the phantom account, *Layaou*, 238 F.3d at 211, its form was insufficient to effectively amend the text of the Plan. Although the district court labeled the Benefits

Update an SPD, we conclude instead that it was insufficiently "accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan," 29 U.S.C. § 1022(a), to be an SPD. As the Benefits Update itself indicates, it was only intended to summarize changes to the Plan and offer "clarification of key points about the plans." Such "corporate literature" cannot take the place of an SPD, from which plan participants are expected to draw their understanding of the terms of their plan. *See Burke*, 336 F.3d at 111.

Accordingly, we disagree with the district court that the 1995 Benefits Update provided timely notice under § 204(h). We also find that the 1998 Benefits Update violated the requirements of § 204(h) because, while the amendment adding the phantom account was fully disclosed, it was not preceded by fifteen days notice to Plan participants. Without such proper notice to Plan participants, the amendment was ineffective as to them.

3. The Impact of the Phantom Account

Having concluded that the phantom account was impermissibly added to the Plan with respect to employees rehired before 1998, we must consider the impact of the phantom account on these employees' benefits.

It is clear that the application of the phantom account reduced the amount of benefits on which the employees had justifiably relied. The district court's conclusion that the phantom account serves only to allow a comparison between the TRA and CBRA accounts and the RIGP benefit, while perhaps correct

in a hyper-technical sense, overlooks the ultimate effect of that comparison. By including a large amount of hypothetical growth in a nonexistent account, the comparison among the three accounts is skewed in favor of selecting either the TRA or CBRA over the RIGP as the basis for payment. However, once either the TRA or CBRA is selected as providing the highest amount of benefits, the phantom account value is taken out, leaving a benefit amount significantly less than what the RIGP would provide. Thus, although the application of the phantom account does not directly deplete an employee's pension account, by altering the comparative process, it imposes a condition on the payment of benefits that leads just as surely to a decrease. *See Cent. Laborers'*, 541 U.S. at 744-45, 124 S.Ct. 2230. Indeed, on remand in a Western District of New York case involving this same Plan, the court reached this exact conclusion when assessing the impact of the phantom account on the plaintiff's benefits: "It resulted in a significant reduction in plaintiff's benefits, compared to what he would have received without the offset ...." *Layaou v. Xerox Corp.*, 330 F.Supp.2d 297, 303 (W.D.N.Y.2004).

We find that this reduction of justified expectations of benefits took the form of a retroactive cut-back in violation of § 204(g). Employees rehired prior to 1998 worked and accrued benefits under a Plan that did not provide for reduction of their benefits by factoring in the hypothetical value of a phantom account. However, once the phantom account was purportedly added, the value of an employee's accrued benefits were reduced significantly. The impact is demonstrated through the disparity

between the RIGP benefits of $2,842 that Frommert was informed he would receive in his 1996 Value Added statement and the ultimate value of $5.31 that was calculated for his TRA account once the phantom account was applied.

On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

4. The 1998 SPD

As we have indicated above, the 1998 SPD amended the text of the Plan to include the phantom account and comparative methodology by fully setting out how they are used to calculate rehired employees' benefits. Indeed, the plaintiffs agreed during oral argument before the district court that the 1998 SPD adequately describes the offset procedure. Appendix at 1803. Employees hired after this amendment to the Plan occurred, unlike those rehired before then, became Plan participants under the terms of the amended Plan. As such, the phantom account may permissibly be applied to them. With full notice of the phantom account's existence, these rehired employees, unlike their predecessors who lacked

such information, had the opportunity to make an informed decision about taking or leaving the terms of the deal offered to them under the Plan.[12]

On remand, it will be necessary for the district court to determine which of the plaintiffs were rehired by Xerox after the Plan was amended to include the phantom account and thus can be bound by its terms.

B. Availability of Equitable Relief

Plaintiffs also appeal the dismissal of their claims for equitable relief under the "catch-all" provision of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). The equitable relief sought by the plaintiffs under this provision comes in two parts. First, they seek a declaration that the phantom account violates ERISA and an injunction against its future use. Second, they seek to bring a claim for breach of fiduciary duty by the plan administrators.[13] The district court dismissed both aspects of this claim because it concluded that all of the relief sought by the plaintiffs could be adequately provided under § 502(a)(1)(B). *Frommert 2002,* 206 F.Supp.2d at 439;

---

[12] Unlike employees rehired before the 1998 SPD was issued, those hired after it was provided were not "participant[s] in the plan" at the time of the change required to be notified under § 204(h).

[13] As the district court noted, the plaintiffs did not identify a statutory basis for the second component of the equitable relief that they seek. However, claims by plan participants for breach of fiduciary duties arise under § 502(a)(3). *See Devlin v. Empire Blue Cross & Blue Shield,* 274 F.3d 76, 89 (2d Cir.2001).

Frommert 2004, 328 F.Supp.2d at 438-39. With respect to the breach of fiduciary duty claim, the district court found in the alternative that the claim lacked merit because the plaintiffs had received notice of the phantom account by 1995 and, further, that the claim was time-barred. *Frommert 2004*, 328 F.Supp.2d at 439. We consider these issues in turn, affirming the district court as to the denial of equitable relief to pursue money damages and vacating the district court's judgment concerning the availability of § 502(a)(3) to state a claim for breach of fiduciary duties against the Plan administrators.

1. Equitable Relief to Pursue Payment of Benefits

On appeal, the plaintiffs contend that although they ultimately seek money damages through recalculation of their pension benefits, the "vehicle" for such relief is a judgment declaring that the phantom account is prohibited by ERISA and enjoining its application in calculating the benefits of any Plan participants. Because we have determined that such sweeping relief is not warranted, we conclude that the necessary remedies can be fully provided under § 502(a)(1)(B). Thus, we affirm the decision of the district court as to this portion of the plaintiffs' claim for equitable relief.

The relief that the plaintiffs seek, recalculation of their benefits consistent with the terms of the Plan, falls comfortably within the scope of § 502(a)(1)(B), which allows a plan participant "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Because adequate relief is available under this provision, there is no need on the facts of this case to

also allow equitable relief under § 502(a)(3). *See Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir.2004) ("when relief is available under section 1132(a)(1), courts will not allow relief under § 1132(a)(3)'s 'catch-all provision.' ").

This issue has been addressed by the Supreme Court, which has consistently disfavored the expansion of the availability of equitable relief where remedies at law are sufficient. In *Varity Corp. v. Howe*, 516 U.S. 489, 512, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), the Court concluded that §§ 502(a)(3) and (5), the section's "catchall" provisions, "act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." It also observed that "we should expect that where Congress provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.' " *Id.* at 515, 116 S.Ct. 1065. In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), the Court, in denying the availability of relief under § 502(a)(3), sounded a note of caution concerning suits purporting to seek equitable relief while also seeking monetary damages:

'Almost invariably ... suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.' *Bowen v. Massachusetts*, 487 U.S. 879, 918-919, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988) (SCALIA, J.,

dissenting). And 'money damages are, of course, the classic form of *legal* relief.' [*Mertens v. Hewitt Associates,* 508 U.S. 248, 255, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993)].

While the plaintiffs seek to expand the nature of their claim by couching it in equitable terms to allow relief under § 502(a)(3), the gravamen of this action remains a claim for monetary compensation and that, above all else, dictates the relief available. *See Gerosa v. Savasta & Co., Inc.*, 329 F.3d 317, 321 (2d Cir.2003) ("In determining the propriety of a remedy, we must look to the real nature of the relief sought, not its label.") (citations omitted).

2. Breach of Fiduciary Duty

The plaintiffs allege that the defendants breached their fiduciary duty to Plan participants by publishing and supplying misleading information in SPDs, annual Personal Benefits Statements and in response to the plaintiffs' requests for clarification of their rights under the Plan. The district court dismissed this breach of fiduciary duty claim, finding it to be duplicative of the claim for equitable relief under § 502(a)(3) that it had already dismissed. The district court also concluded that this claim lacked merit because the Plan participants were made fully aware of the phantom account by 1995, a fact that it concluded made the claim untimely because the original complaint was filed in 1999, beyond the three year statute of limitations applicable to such a claim. *Frommert 2004,* 328 F.Supp.2d at 438-39. We disagree with these conclusions and vacate the district court's judgment as to this portion of the plaintiffs' claim under § 502(a)(3).

First, we cannot agree with the district court's conclusion that the breach of fiduciary duty claim lacks merit as a matter of law. As a preliminary matter, we note that "whether a person is a fiduciary in a particular situation is a question of law and fact." *Gray v. Briggs,* No. 97 Civ. 6252, 1998 WL 386177 (S.D.N.Y. July 7, 1998) (citing *LoPresti v. Terwilliger,* 126 F.3d 34, 39-40 (2d Cir.1997)). Here, however, the district court did not reach the threshold issue of whether the defendants acted as fiduciaries under ERISA because the court dismissed the Plaintiffs' breach of fiduciary duty claim as time barred and duplicative. *See Frommert 2004,* 328 F.Supp.2d at 438-39.

Although we cannot conclude as a matter of law based on the record before us whether the defendants had fiduciary obligations under ERISA and if so whether they breached them, we conclude that there is a triable issue of fact on these questions. We therefore remand to the district court for further proceedings on this issue.

ERISA provides that a " 'person is a fiduciary with respect to a plan,' and therefore subject to ERISA fiduciary duties, 'to the extent' that he or she 'exercises any discretionary authority or discretionary control respecting management' of the plan, or 'has any discretionary authority or discretionary responsibility in the administration' of the plan." *Varity Corp.,* 516 U.S. at 498, 116 S.Ct. 1065 (quoting ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A)). This court has recognized Congress's intention that ERISA's definition of fiduciary be broadly construed. *See LoPresti v. Terwilliger,* 126 F.3d 34, 40 (2d Cir.1997) (citing *Blatt v. Marshall &*

Lassman, 812 F.2d 810, 812 (2d Cir.1987)). "Unlike the common law definition under which fiduciary status is determined by virtue of the position a person holds, ERISA's definition is functional." *LoPresti*, 126 F.3d at 40 (internal citation omitted).

The district court, in dismissing plaintiffs' breach of fiduciary duty claim as duplicative and time barred, stated in dicta that "this claim, which is based largely on defendants' alleged failure to disclose the existence of the phantom account offset is meritless." The court made no findings of fact concerning whether defendants acted in a fiduciary capacity towards the plaintiffs. *Cf. Varity Corp.*, 516 U.S. at 498, 116 S.Ct. 1065 ("In reviewing [the district court's] legal conclusion [that the defendant acted as fiduciary], we give deference to the factual findings of the District Court, recognizing its comparative advantage in understanding the specific context in which the events of this case occurred.").

We therefore remand to the district court for further proceedings on these questions.[14] On remand, the district court should permit a trier of fact to assess (1) whether the defendants acted in a fiduciary capacity when they communicated with the Plan's

---

[14] In *Devlin v. Empire Blue Cross & Blue Shield*, this court also instructed that on remand "the district court should permit a trier of fact to evaluate [the defendant's] communications with plaintiffs for affirmative misrepresentations regarding plan benefits and for failure to provide completely accurate plan information," concluding that a "trier of fact could find that there was a fiduciary duty and that [defendant] breached it." 274 F.3d at 89.

beneficiaries about the implementation of the phantom account, and (2) whether those communications contained affirmative misrepresentations of fact concerning the Plan or breached the defendants' duty to deal fairly with the Plan's beneficiaries.

Second, we disagree with the district court's conclusion that all of the relief sought by the plaintiffs in their claim for breach of fiduciary duties can be adequately addressed by the relief available under § 502(a)(1)(B). In *Devlin*, this Court considered whether the Supreme Court's decision in *Varity Corp.* foreclosed the availability of a private cause of action for breach of fiduciary duty under § 502(a)(3) when another potential remedy is available and held that it did not. 274 F.3d at 89-90. Rather, we held that responsibility for determining "appropriate equitable relief" rests with the district court. *Id.* at 89. That determination "must be based on ERISA policy and the 'special nature and purpose of employee benefits plans'," *id.* (quoting *Varity Corp.*, 516 U.S. at 515, 116 S.Ct. 1065), as well as consideration of the relief afforded the plaintiffs under their § 502(a)(1)(B) claim. Thus, we direct the district court that if the plaintiffs prevail on this claim, it must determine what "appropriate equitable relief" is necessary. Although the district court has previously addressed this issue and found no relief was necessary, in light of our holdings above, we direct that it reconsider the issue should the plaintiffs prevail on this claim.

Third, and finally, we reject the district court's findings that the plaintiffs' claim for breach of fiduciary duty was untimely. Under ERISA § 413, 29

U.S.C. § 1113, such a claim must be brought within "(1) six years after (A) the date of the last action which constituted a part of the breach ..." or "(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation," whichever is earlier. The district court found the claim to be untimely under § 413(2) because it determined that the three year statute of limitations began to run in 1995 when the Benefits Update disclosing the nature of the phantom account was issued. *Frommert 2004*, 328 F.Supp.2d at 439.

The flaw with the district court's conclusion is that the plaintiffs' claim for breach of fiduciary duty is not premised solely on the defendants' adoption of the phantom account; rather, it is based on allegations that the defendants made ongoing misrepresentations about the origins of the phantom account in an effort to justify its usage. As a result, learning the manner in which the phantom account functions was not sufficient to provide "actual knowledge" that a breach of fiduciary duty had occurred. "[A] plaintiff has 'actual knowledge of the breach or violation' within the meaning of ERISA § 413(2), 29 U.S.C. § 1113(2), when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 193 (2d Cir.2001). Although the 1995 Benefits Update may have provided notice that the plaintiffs' benefits would be lower than they expected, it certainly did not inform the plaintiffs that the phantom account was being applied in contravention of the Plan's terms. Thus, while the Benefits Update may have heightened the plaintiffs'

concerns regarding their expected benefits, "it is not enough that [plaintiffs] had notice that something was awry; [plaintiffs] must have had specific knowledge of the actual breach of duty upon which [they sued]." *Id.* (alteration in original) (internal quotation marks and citation omitted). Such knowledge of an actual breach could only come with disclosure of the fact that the defendants misrepresented the terms of the Plan in justifying the usage of the phantom account.

Accordingly, the district court erred in holding that the three-year statute of limitations began to run when the 1995 Benefits Update was issued. On remand, the district court is directed to determine when the plaintiffs had actual knowledge of the alleged breach of the defendants' fiduciary duties.

III. Conclusion

For the foregoing reasons, we Vacate the judgments dismissing this action, except as to the anti-forfeiture claim under § 203(a)(2) and the claim for a declaratory judgment and an injunction under § 502(a)(3), which we affirm, and Remand for further proceedings consistent with this opinion.

United States District Court, W.D. New York.

Paul J. FROMMERT, et al., Plaintiffs,

v.

Sally L. CONKRIGHT, Patricia M. Nazemetz and Lawrence M. Becker, Xerox Corporation Retirement Income Guarantee Plan Administrators and Xerox Corporation Retirement Income Guarantee Plan, Defendants.

No. 00-CV-6311L.

July 30, 2004.

DECISION AND ORDER

LARIMER, District Judge.

INTRODUCTION

Although adopted for salutary purposes, pension and other employee benefit plans have spawned much litigation over the years, particularly since the adoption of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101 *et seq.*, in 1974.[1] This case presents one more example.

---

[1] For example, a Westlaw search for the term "court" which presumably appears in every reported case yields 2658 cases decided prior to 1974 in the Federal Pension & Retirement Benefits-Cases ("FPEN-CS") database. The same search yields 2655 cases for 2003 alone.

At issue in this case is the pension plan of Xerox Corporation, The plan called the Retirement Income Guarantee Plan ("RIGP" or "Plan") has already been the subject of several prior decisions of this Court[2] and other courts.[3]

The details of plaintiffs' claims will be spelled out below, but in a nutshell, they contend that the Plan administrator has wrongfully calculated the amounts of plaintiffs' benefits under the Plan. The net result of that calculation is that plaintiffs receive (or will receive, in the case of those plaintiffs who have yet to retire) hundreds, and in some cases even thousands, of dollars less per month than plaintiffs believe they should. Plaintiffs ask the Court to declare that the administrator should calculate their benefits according to plaintiffs' view of the Plan provisions.

After this Court granted defendants' motion to dismiss, in part, (*Frommert v. Conkright*, n. 1, *supra*), plaintiffs filed an amended complaint styled the First Consolidated Amended Complaint joining *Levy v. Conkright* (01-CV-6447) with this case in one

---

[2] *Frommert v. Conkright*, 206 F.Supp.2d 435 (W.D.N.Y.2002); *Layaou v. Xerox Corp.*, 69 F.Supp.2d 419 (W.D.N.Y.1999); *vacated and remanded*, 238 F.3d 205 (2001).

[3] *Berger v. Xerox Retirement Income Guaranty Plan*, 231 F.Supp.2d 804 (S.D.Ill.2002); *Hammond v. Xerox Corp. Retirement Income Guarantee Plan*, Appendix to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment (C.D.Cal. Apr. 7, 1999) (Byrne, J.), *aff'd*, 225 F.3d 662 (9th Cir.2000); *Miller v. Xerox Corp. Retirement Income Guarantee Plan*, No. CV 98-10389 (C.D.Cal. Feb. 24, 2004) (Byrne, J.).

complaint on behalf of roughly 100 present and former employees of Xerox. In that complaint, plaintiffs contend that defendants-the administrators of the Plan-violated various provisions of ERISA in calculating plaintiffs' retirement benefits.

All the plaintiffs share this common circumstance: they were all former employees of Xerox who left, requested and received lump-sum distributions from the Pension Plan and, years later, were rehired by Xerox, which resulted in their accruing benefits again under the Plan. Some plaintiffs have retired again and object to the benefits calculated by defendants; others, probably the majority, still work at Xerox and seek a declaration now of their rights to benefits in the future.

The principal matter of contention is whether the administrators properly offset plaintiffs' prior lump-sum distributions, as enhanced, against the retirement benefits accruing as a result of the employees being rehired. Prior distributions become a factor, as an offset, because the Plan directs that all the years of service count in calculating benefits-both years before receiving the lump-sum distribution and years of service once rehired. The offset is calculated by the value of the prior lump-sum distribution plus any sum that the distribution would have earned (hypothetically) had it remained in the fund and been invested. The parties refer to this as the "phantom account" offset. For several reasons, plaintiffs object to this method of calculating

benefits and seek a declaration under § 1132(a)(1)(B) that the Administrator erred in calculating benefits using this formula.[4]

Xerox has moved for summary judgment dismissing the complaint. Plaintiffs Paul Frommert and Alan Clair have cross-moved for summary judgment, although the declaratory and injunctive relief that they seek would seemingly inure to the benefit of all the plaintiffs. Frommert is typical of those employees who, after joining this action, left Xerox's employ, and who seek additional benefits in accordance with their interpretation of the Plan. Clair is typical of the majority of the plaintiffs in this action, who are still employed by Xerox and seek a declaration clarifying the manner in which their benefits will be calculated in the future.

FACTUAL BACKGROUND[5]

I. Relevant Plan Provisions

An understanding of plaintiffs' claims requires some familiarity with certain Plan provisions, as well as with the Plan's various restatements and amendments over the years. The RIGP was first adopted in 1977. At all times relevant to this action,

---

[4] Section 1132(a)(1)(B) provides that a civil action may be brought by a participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan...."

[5] Because the relevant facts are not in dispute, they will only be summarized here. Additional pertinent facts will be mentioned in the Discussion section as appropriate.

the Plan has provided that, upon retiring, an employee will receive benefits in an amount equal to the highest result of three alternative calculation methods.

The first calculation method is the retirement plan formula ("RIGP Formula"), which is a guaranteed annuity calculated by multiplying years of service (up to thirty years) by 1.4 percent of the highest-average yearly pay (defined as the average of the employee's five highest-paying calendar years with Xerox). If an employee retires early, defined as retiring after the age of 55 but before the age of 65, that person's RIGP Formula benefit is reduced by five percent for each year that he receives retirement benefits before reaching the age of 65. For rehired employees, the number of years of service includes the total time the employee worked for Xerox, not just the period of employment following rehire.

The second method for calculating retirement benefits under the Plan is based on the employee's Cash Balance Retirement Account ("CBRA"), which consists of yearly contributions by Xerox of an amount equal to five percent of the employee's salary, accruing interest at a yearly fixed rate of one percent above the one-year Treasury Bill rate. For those employees who began their tenure with Xerox prior to the end of 1989, their CBRA also includes the transferred balance of a Profit Sharing Retirement Account ("Retirement Account") that Xerox maintained for each employee up until December 31, 1989.

The third calculation method under the Plan, which is only applicable to employees hired by Xerox prior to 1989, is based on the employee's Transitional

Retirement Account ("TRA"). The TRA consists of the employee's transferred Retirement Account balance as of December 31, 1989, together with any increase that would have occurred if the balance had remained invested.

Because the calculation of an employee's benefits is based upon all the employee's years of service, some mechanism is needed to reflect prior lump-sum payments received by employees who, like plaintiffs, had previously left Xerox and then returned. Otherwise, the employee would receive a windfall. To that end, the Plan has, over the years, contained several provisions dealing with offsets for prior distributions. For example, the 1989 RIGP (which is the Plan that plaintiffs contend should be applied here) stated in § 9.6:

Section 9.6. Nonduplication of Benefits. In the event any part or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, if Section 8.8 [dealing with incompetent beneficiaries] does not apply to such distribution and such Member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

Becker Aff. Ex. F.

In 1990, the Plan was amended in several respects. Among other things, § 1.8 was amended. Prior to the 1990 amendment, § 1.8 had simply defined the CBRA as "[t]he Account established for a Member pursuant to Article 18." Becker Aff. Ex. F. Article 18 set forth the provisions governing the CBRA. The

1990 Amendment added substantial additional language to § 1.8, including the following:

Where a Member has received a distribution from his Cash Balance Retirement Account prior to the relevant time [*i.e.*, the time as of which the calculation of an accrued benefit is determined], it shall be assumed that his actual Cash Balance Retirement Account balance at the relevant time includes an amount equal to the sum so distributed as it would have increased during the period from the time of the distribution to the relevant time if such sum had continued to be invested in the Cash Balance Retirement Account.

Becker Aff. Ex. F at 89.

The 1990 amendments also added similar language to § 1.41 of the Plan, which dealt with the TRA. Prior to being amended, § 1.41 of the 1989 Restatement had defined the TRA as "[t]he account established for a Member pursuant to Article 17." Becker Aff. Ex. F. The 1991 amendment to § 1.41 added several provisions regarding the TRA, including the following:

Where a Member has received a distribution from his Transitional Retirement Account prior to the relevant time, it shall be assumed that his actual Transitional Retirement Account balance at the relevant time includes an amount equal to the sum so distributed as it would have increased or decreased during the period from the time of the distribution to the relevant time if such sum had been invested in the General Fund, the Guaranteed Fund, the Income Fund or the Segregated Assets Fund, in whichever the Member participated at the

time of the distribution.

Becker Aff. Ex. F at 106.

A new restatement of the Plan was issued in 1993. The 1993 restatement included language largely identical to that in the above amendments. *See* Becker Aff. Ex. G at §§ 1.9, 1.41. In addition, the 1993 restatement provided in § 1.45(f) that "[t]he benefit payable under this Plan to such Member who has received a prior distribution will be reduced by the previously distributed amount with adjustments to the 'relevant time' under Section 1.9 or 1.41, or at the time of the subsequent distribution under Section 4.2." Becker Aff. Ex. G.

The Plan has been restated since then, in 1996 and 1998 for example, and each restatement has included language similar to these provisions. *See* Becker Aff. Ex. H, §§ 1.40, 1.45(f); Ex. I, §§ 1.8, 1.38.

The Summary Plan Description ("SPD") also contains some discussion of the effect of prior distributions, although the wording of the SPD has changed over the years. In *Layaou v. Xerox Corp.*, 238 F.3d 205 (2d Cir.2001), the Court of Appeals for the Second Circuit held that the SPD that was in effect in 1994 and early 1995 failed to provide notice to employees that their future benefits would be offset by an appreciated value of any prior lump-sum distributions. In so holding, the court noted that

The only relevant language in Xerox's SPD states that "[t]he amount you receive may also be reduced if you had previously left the Company and received a distribution at that time." The SPD does not mention the term "phantom account," describe the "phantom account" offset concept, or even indicate that the

choice among the three methods of calculating future benefits will be made by first adding on, and then later offsetting, not the amount of the prior distributions but instead an appreciated value of the prior lump-sum distributions. Nor does the SPD offer any example of how to calculate benefits for individuals who had received prior lump-sum distributions.

Id. at 210.

The SPD issued in September 1995, however, contained different language concerning the effect of prior distributions. Specifically, it stated:

It is important to note that if you have received a prior distribution from the plan, this will affect the calculation of your benefit. In calculating your RIGP benefit for the purpose of determining the highest of your TRA, CBRA, or formula benefit, the amount of your prior distribution will be added to your TRA and CBRA accounts, along with hypothetical investment gains and/or losses attributable to the prior distribution, as if the money had been left in your accounts. However, since you already received the prior distribution and there were no actual investment gains and/or losses on this amount, the payment of your RIGP benefit will not include the prior distribution or any hypothetical investment gains and/or losses.

Becker Aff., Ex. K at 10.

The 1998 SPD also set forth this concept in some detail. It stated, "If you previously received a distribution from RIGP, this prior distribution will affect future benefits payable to you under the Plan." Becker Aff., Ex. L at 51. The SPD then set forth

three steps for calculating the benefits payable to employees who had received prior distributions, as follows:

Step 1: Calculate the *current value* of your prior distribution

To determine what the value of your accounts would have been if you had not taken a distribution, take the amount of each account at the time it was distributed to you and add the investment results the accounts would have earned had a distribution not been taken.

Step 2: Determine the greatest total benefits

Add the current values of the CBRA and TRA that were previously distributed to any actual amounts earned since your rehire date. Using these total amounts, compare the three components-retirement plan formula, total CBRA, and total TRA-to determine the greatest benefit.

Step 3: Reduce the greatest total benefit by the current value of the prior distribution

Your future pension payment will not include the current value of your prior distribution. The greatest total benefit calculated in Step 2 will be reduced by the current value of your prior distribution. Your future pension payment will not include the current value of your prior distribution. The remaining benefit, if any, is the amount payable to you when you leave.

Becker Aff., Ex. L at 52.

The 1998 SPD also explains the reason why prior distributions affect future benefits. It states:

Length of benefit service is a key factor in determining retirement benefits. Calculating and including the current value of prior distributions puts employees who took a prior distribution on the same level as employees whose balances remained invested in the plan. Without this adjustment, employees who took a prior distribution could receive higher (or lower) benefits than employees who had no prior distributions. This process ensures that the Company provides the same benefit dollars for employees with the same pay and benefit service-whether or not there was a prior distribution.

Becker Aff. Ex. L at 53. The SPD then went on to provide three examples of benefits would be calculated under the TRA, CBRA, and RIGP formulas, where the employee had received a prior distribution. *Id.* at 53-54.

II. Application of Offset Provisions to Plaintiffs

The actual operation of these Plan provisions concerning prior-distribution offsets can be illustrated by examining how they were applied to the plaintiffs in this case. As stated, the plaintiffs are all current or former employees of Xerox, each of whom worked for Xerox during two separate periods of time. During their original periods of employment, each plaintiff (with one exception, *see* n. 14, *infra*) was a participant in the Plan. Upon their initial termination of employment, each plaintiff elected to receive a lump-sum distribution of his pension benefit. The employee obviously used that distribution as he/she saw fit. Each plaintiff was later re-hired by Xerox and again became a participant in the RIGP. Under the terms of the RIGP as described above, the amount of each

plaintiff's current pension benefit was (or will be) offset by the amount of the prior distribution plus any earnings which would have accrued had plaintiffs left the amount of their distribution in the Plan.

The genesis of the present dispute occurred in 1996, when plaintiffs Frommert and Clair sought clarification from Xerox of their projected future benefits. They complained when they discovered that their projected monthly benefits would be much lower than they had expected, due to the phantom account offset.

Although the exact figures differ from plaintiff to plaintiff, in general the process by which the administrator arrived at their monthly benefits was the same with respect to all the plaintiffs. Frommert serves as a typical example.

Frommert had previously worked for Xerox from 1960 until January 1986, at which time he received a lump-sum payment of $145,780[6] in retirement benefits.[7] Frommert Aff. (Docket # 91) ¶ 9. Frommert

---

[6] Unless otherwise noted, all dollar amounts are rounded off to the nearest dollar.

[7] Although Frommert does not state how he happened to receive his benefit in a lump sum as a opposed to an annuity, the Plan in effect at that time provided that the retirement benefit of a participant who terminated employment prior to reaching early retirement age would be paid in the form of an annuity, unless the participant elected to receive the benefit in another form of payment. One of the available forms of payment was a lump sum. *See* Becker Aff. Ex. D at § § 8.1-8.5.

was rehired by Xerox in November 1989.

In 1996, Frommert received his "value added" statement (an annual statement concerning an employee's benefits) from Xerox, stating that "[u]nder the RIGP formula, the monthly benefit you have earned to date, payable at age 65, is $2,482 per month." Frommert Aff. Ex. E at 6. Later that year, however, Frommert received a projection of his retirement benefits, which indicated that his actual benefit would be only $5.31 per month. Frommert Aff. Ex. F.

The retirement benefits projection, like the value-added statement, said that Frommert's monthly benefit under the RIGP formula came to $2482. His TRA and CBRA balances were listed at $504,737 and $415,394 respectively. Those figures, however, included the so-called phantom account. In other words, the administrator calculated how much Frommert's prior distribution would have grown had it remained in each of those accounts, and then added that amount to the amount that was actually in each account. Because the TRA balance was higher, the administrator used that amount to calculate a monthly benefit, which came out to $3125.

The administrator then compared that monthly benefit with Frommert's RIGP monthly benefit. Since the $3125 TRA benefit was higher than the $2482 RIGP benefit, the administrator chose the TRA as the benefit payment method. For determining the *actual* payment amount, however, the administrator then subtracted the phantom account offset-*i.e.*, the current monthly equivalent of the prior distribution, or $3120-from the TRA

monthly benefit, leaving an actual monthly benefit of $5.31. Frommert Aff. Ex. F.

On September 17, 1996, Frommert wrote a memo to defendant Patricia Nazemetz, the then-Director of Benefits at Xerox, stating that it "came as a shock" to him to discover that his projected benefit was only $5.31 per month instead of $2482. Frommert Aff. Ex. F. Xerox treated his memo as a request for additional benefits, and denied the request. In a memo to Frommert dated October 14, 1996, Kathleen Russell, Xerox's Manager, Total Pay Program Management, explained that "upon retirement, you are entitled to the higher of your RIGP Formula Benefit, your TRA or your CBRA. However, your TRA and CBRA accounts must take into consideration your prior distribution (including investment results) as if it had never left the plan." Frommert Aff. Ex. G. Frommert appealed that decision, *see* Frommert Aff. Ex. H, and the administrator denied his appeal in November 1996. *See* Frommert Aff. Ex. I.[8]

III. Procedural Background

Plaintiffs commenced this action on November 24, 1999, seeking clarification of their rights to future benefits. There are currently about 100 plaintiffs in this action, most of whom, as stated, are still

---

[8] Clair also initially inquired about his benefits in 1996, but did not challenge the administrator's calculation until 1999, when he learned that other Plan participants had retained counsel to challenge the application of the phantom account offset. *See* Clair Aff. ¶ 82 and Ex. E. His appeal was denied in August 1999. *See* Clair Aff. Ex. H.

employed at Xerox. All the plaintiffs challenge the method used to calculate the offset for prior distributions, specifically the use of the phantom account offset. Although plaintiffs recognize that the Plan, as now written, does provide for the offset, they contend that the Plan was improperly amended to include the offset provisions, and that the Court should direct the administrator to disregard those purported amendments. Defendants, on the other hand, contend that the Plan was not actually amended in this regard, because the Plan has always provided for the challenged offset, and that recent restatements of the Plan have simply provided a more detailed statement concerning the offset procedure.

The complaint asserts four separate causes of action. The first seeks relief under 29 U.S.C. § 1132(a)(1)(B), based on plaintiffs' allegation that Xerox's SPDs inadequately disclosed the phantom account offset, in violation of 29 U.S.C. § 1022. The second alleges that defendants breached their fiduciary duties by applying the phantom account offset and by not adequately disclosing the offset to plaintiffs. The third cause of action alleges that defendants' application of the phantom account offset violates 29 U.S.C. § 1053, which provides that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age," and that "[a] plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions." The fourth cause of action

alleges that defendants amended the Plan to provide for the phantom account offset, in violation of 29 U.S.C. § 1054(g) ("The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan ..."), and without proper notice under 29 U.S.C. § 1054(h).[9]

DISCUSSION

I. Scope of Review

The parties do not dispute that plaintiffs have exhausted their administrative remedies and now properly seek a declaration of their rights under ERISA, § 1132(a)(1)(B). Duly designated administrators of the Plan have made decisions that are adverse to these plaintiffs, and plaintiffs seek relief in this Court. The Court, then, must determine by what standard it should conduct its review of the challenged decisions.

At the outset, though, it is important to remember what this Court is *not* empowered to do. This Court's task is not to write a "better" plan or rewrite provisions of the existing Plan. *See Henglein v. Colt Industries Operating Corp.*, 260 F.3d 201, 215 (3d Cir.2001) ("The courts are not at liberty to rewrite

---

[9] **Notice of significant reduction in benefit accruals**
(1) A [pension] plan ... may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to-

(A) each participant in the plan....

the terms of an ERISA plan"), *cert. denied*, 535 U.S. 955, 122 S.Ct. 1358, 152 L.Ed.2d 354 (2002); *United McGill Corp. v. Stinnett*, 154 F.3d 168, 173 (4th Cir.1998) (use of federal common law applicable to ERISA actions "is not a license to rewrite the Plan to the Court's tastes") (quoting *Health and Welfare Plan for Employees of REM, Inc. v. Ridler*, 942 F.Supp. 431, 435 (D.Minn.1996), *aff'd*, 124 F.3d 207 (table), 1997 WL 559745 (8th Cir.1997)). Nor is it for the Court to decide whether Xerox was wise in writing the Plan as it did, or whether it *could* have come up with a "better" plan. *See Felde v. City of San Jose*, 839 F.Supp. 708, 711 (N.D.Cal.1994) ("whether or not a better plan might exist is not the issue before this court"). The operative Plan is what it is. No matter what standard of review I apply, then, the result must be governed by how the Plan *is* written, not by how it *might* have been written.

Defendants contend that the Court must give deference to the decision of the administrators because the Plan empowers the administrators with such discretion. The plaintiffs, on the other hand, contend that this Court's review should be more expansive and that the Court should examine the issues *de novo*.

The United States Supreme Court has ruled that issues relating to the denial of benefits must be reviewed *de novo*, "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 116, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). The Second Circuit has also stated that "[w]here the plan reserves such discretionary

authority, denials are subject to the more deferential arbitrary and capricious standard, and may be overturned only if the decision is 'without reason, unsupported by substantial evidence or erroneous as a matter of law.' " *Kinstler v. First Reliance Std. Life Ins. Co.*, 181 F.3d 243, 249 (2d Cir.1999) (quoting *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 442 (2d Cir.1995)).

Xerox has had several plans over the years, since 1977, and these plans, and the corresponding SPDs grant broad authority to the administrator to interpret the provisions of the Plan. For example, the 1989 Plan states at § 10.2 that "[i]n the administration of the Plan the Administrator may, subject always to the requirements of Section 10.5 [which sets for the administrator's fiduciary duties] ... [c]onstrue the Plan and the Trust Agreement thereunder...." Affidavit of Robert H. Jaffe (Docket # 89), Ex. A at 51. The 1993 Restatement contains the same language, but adds the words "and resolve any ambiguity with respect thereto" at the end. Jaffe Aff. Ex. C § 10.2(e). The same language appears in the 1998 Plan. *See* Jaffe Aff. Ex. G § 10.2(e). Similarly, the 1995 SPD states that "[t]he Plan Administrator (or designee) has the exclusive right to interpret the appropriate plan provisions; its decisions are conclusive and binding." Affidavit of Lawrence M. Becker (Docket # 96), Ex. L at 72.[10]

---

[10] Although the 1993 SPD does not appear to have been submitted by either side in this case, the court in *Montesano v. Xerox Corp. Retirement Income Guarantee Plan*, 117 F.Supp.2d 147 (D.Conn.2000), *aff'd in part, vacated on other grounds in* (continued...)

The above-referenced language clearly indicates that the Administrator was intended to exercise broad discretion in making decisions relative to the Plan. Accordingly, the Court will apply the arbitrary-and-capricious standard of review in this case. *See, e.g., Ganton Techs., Inc. v. Nat'l Indus. Group Pension Plan,* 76 F.3d 462, 466 (2d Cir.1996) (applying arbitrary-and-capricious standard of review where plan documents gave trustees authority to "resolve all disputes and ambiguities relating to the interpretation of the Plan, and the application of the terms of the Plan to any circumstances and the decisions of the Board in all such matters will be final").

II. Which Plan Document(s) Control(s)

For various reasons, which will be discussed in detail below, plaintiffs contend that the calculation of their benefits should be governed not by the Plan documents now in effect (or in effect when they most recently retired), but by the 1989 Restatement, which is no longer in effect. Alternatively, plaintiffs contend that the 1993 and 1996 Restatements (which are in most material respects identical) should control. Plaintiffs contend that these earlier restatements of the Plan do not call for the use of a phantom account offset.

The general rule, however, is that the plan that

---

part, 256 F.3d 86 (2d Cir.2001), quoted the 1993 SPD as containing discretion-granting language identical to that in the 1995 SPD. *See id.* at 156 ("conclu[ding] that this language is sufficient to confer discretion on the Plan Administrator ...").

controls is the one that is in effect at the time that the employee applies for benefits. As the Seventh Circuit has explained in a case involving another of Xerox's benefit plans:

> Since the employer can change the plan, then it must follow that the controlling plan will be the plan that is in effect at the time a claim for benefits accrues. We have held that a claim accrues at the time benefits are denied. Therefore, absent any language suggesting ambiguity on the vesting question, the controlling plan must be the plan in effect at the time the benefits were denied.

Hackett v. Xerox Corp. Long-Term Disability Income Plan, 315 F.3d 771, 774 (7th Cir.2003) (citations omitted). *See also Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1160-61 (9th Cir.2001) (relevant plan documents are those in effect at the time of the denial of benefits); *Davis v. Armco, Inc.*, 169 F.Supp.2d 164, 168 (W.D.N.Y.2001) (applying plan that was in effect at time that participant retired).

In the case at bar, both Clair and Frommert were still employed at Xerox at the time this lawsuit was commenced in 2000. *See* Clair Aff. ¶ 3. Frommert states in his affidavit that he remained employed at Xerox until March 2002, when he was terminated as part of a reduction in force. Frommert Aff. ¶ 3. In addition, although only Frommert and Clair have actually moved for summary judgment, the declaratory relief that they seek would inure to the benefit of all the plaintiffs, and there is no indication in the complaint that any of the plaintiffs had actually sought, and were denied, increased benefits prior to the commencement of this lawsuit. Instead,

it appears from the record that Frommert was the first plaintiff in this action to seek clarification of his *future* benefits, and that the other plaintiffs' similar requests were made in 1999 or later. *See* Becker Aff. Ex. M.

The fact that Frommert requested some clarification of his benefits in 1996, when the 1996 Restatement was in effect, is of no moment, since his request, and the administrator's subsequent decision, simply concerned an estimate of what his benefits would be *if* he retired at that time. The fact is that Frommert did not finally leave Xerox's employ until 2002, so the Plan in effect in 2002 is the one that ultimately governs his claim. *See Grosz- Salomon*, 237 F.3d at 1160 (where benefits were denied pursuant to plan in existence at the time of the denial, fact that plaintiff had filed *claim* for benefits while earlier policy was in effect was irrelevant, since that "d [id] not entitle her to invoke that [earlier] plan's provisions in perpetuity").

There appears to be no dispute here that at least by 1998, and continually since then, the Plan has expressly provided for the phantom account offset exactly as it has been applied to plaintiffs. The Plan and relevant SPD could not be clearer. Even plaintiffs' counsel conceded at oral argument that defendants "finally ... got it right" in the 1998 Restatement. Tr. at 10, lines 3-4. Specifically, §§ 1.8 and 1.38 of the 1998 Restatement provide, in pertinent part, that "[w]here a Member has received a distribution from his Member's [pre-1989] Retirement Account ... prior to the relevant time, it shall be assumed that his actual [CBRA or TRA] balance at the relevant time includes" the phantom

account, *i.e.*, an amount equal to whatever the amount of the distribution would have been had it continued to be invested in the relevant account.[11] Under the terms of the 1998 and later restatements, then, defendants' application of the phantom account offset was therefore proper.

Plaintiffs appear to recognize that, if their claims are governed by these later restatements, those claims will fail, for one of their main arguments is that the Court should disregard all amendments to the Plan after 1989, and apply the terms of the Plan as it existed in 1989. Plaintiffs contend that the 1989 Plan contained no "phantom account" provision, and, therefore, such an account should not be used in the calculation of these plaintiffs' benefits.

In a nutshell, plaintiffs contend that the amendments were improperly made and, therefore, ineffectual. As such, they claim that the amendments in later Plan documents have no bearing on plaintiffs' applications.

In support of their contention that the Plan was not properly amended, plaintiffs rely upon § 204(h) of ERISA, 29 U.S.C. § 1054(h). At all times relevant to this action,[12] § 204(h) provided:

(h) Notice of significant reduction in benefit accruals

(1) A [pension] plan ... may not be amended so as to

---

[11] These provisions remained unchanged in the 1999 Restatement. *See* Becker Aff. Ex. J.

[12] Subsection (h) was amended in certain respects in 2001, though it still requires that notice be given to plan participants.

provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to-

(A) each participant in the plan ...

Plaintiffs contend that defendants did not provide such notice of any of the later amendments setting forth the application of the phantom account, and that any purported changes to the Plan after 1989 should therefore be deemed ineffective.

Defendants apparently do not dispute that they did not provide plaintiffs with written notice of the amendments in question, but they contend that notice was not required because the Plan had *always* provided for an offset for prior distributions, and that the amendments at issue simply clarified how the offset was calculated. Defendants also maintain that the amendments had no effect on the rate of plaintiffs' benefit accrual.

As to defendants' first argument, it does appear that the phantom account offset was provided for both before and after the 1989 Restatement was issued. Prior to 1989, Xerox retirement benefits were governed by the RIGP and the "Profit Sharing Plan." While the details of the operation of the Profit Sharing Plan are not important for purposes of this Decision and Order, the 1983 Restatement (and later pre-1989 restatements) set forth a phantom account provision virtually identical to the ones challenged in the case at bar. *See* Becker Aff. Ex. C, § 1.30.

The 1989 Restatement eliminated the Profit Sharing

Plan, and transferred balances under that plan to employees' TRA and CBRA accounts. Although the 1989 Restatement continued to contain a nonduplication-of-benefits provision at § 9.6, it did not expressly set forth the phantom account principle. Defendants contend, however, that the phantom account offset continued to be applied throughout the history of the Plan, and that the post-1989 amendments simply clarified this. Plaintiffs have offered no evidence to the contrary, and they have not shown that the challenged amendments actually brought about some change in how benefits were calculated, as opposed to simply explaining the method of calculation in greater detail.

Plaintiffs' argument that § 204(h) notice was required here is based on a labyrinthine, but ultimately meritless, interpretation of the various Plan amendments and restatements over the years. The main thrust of this argument is that, at certain times after issuance of the 1989 Restatement, the Plan was amended, or again restated, to provide for phantom accounting in calculating a member's CBRA and TRA balances where the member had received a prior distribution from either of *those accounts*. Plaintiffs' position is that the distributions that they received were not from the CBRA or the TRA, but from the Retirement Account, which ceased to exist as of January 1, 1989. Plaintiffs contend that not until 1997 and 1998 was language added to the Plan to specify that the offset would also apply to prior distributions from the Retirement Account. Because no notice was given of those changes in 1997 and 1998, plaintiffs argue, the addition of that language is a nullity.

There are several flaws in plaintiffs' reasoning. First, it appears to be undisputed that the Plan administrator had consistently applied the phantom account offset to *all* prior distributions, including distributions from the Retirement Account, even under the 1989 Restatement of the Plan. Plaintiffs may believe that the 1989 Restatement did not provide for such an offset, but it is important to remember here that the Court's review of the challenged decisions is not *de novo*. Rather, the administrator's interpretation of the Plan can only be overturned if it is arbitrary and capricious. *See Pagan*, 52 F.3d at 442 (courts are not free to substitute their own judgment for that of the plan administrator); *see also Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir.1995) ("nothing in the legislative history suggests that Congress intended that federal district courts would function as substitute plan administrators ...") (internal quotes omitted); *Miles v. New York State Teamsters Conf. Pension & Ret. Fund Employee Pension Benefit Plan*, 698 F.2d 593, 601 (2d Cir.1983) ("[w]here both the trustees of [an ERISA plan] and a rejected applicant offer rational, though conflicting, interpretations of plan provisions, the trustees' interpretation must be allowed to control").

Given the history of the Plan, I do not believe that the administrator's consistent application of the phantom account offset can be said to be arbitrary and capricious. Participants' Retirement Account balances were used as the starting balances for their CBRAs and TRAs as of January 1, 1989. Since the 1989 Restatement continued to provide for nonduplication of benefits, it was not unreasonable

for the administrator to conclude that the phantom account offset should continue to be used as well.

Likewise, the administrator could reasonably have understood the language in the Plan referencing prior distributions from the CBRA and TRA to include distributions from the Retirement Account as well. Since a participant's Retirement Account balance formed the basis for his initial CBRA and TRA balances, it was reasonable for the administrator to conclude that the references to offsets for prior distributions from those accounts were also intended to apply to distributions from the Retirement Account, which was the direct predecessor of the CBRA and TRA.

Plaintiffs' argument that the 1993 and 1996 Restatements should be read as applying only to prior distributions from the TRA or CBRA, and not from the Retirement Account, was also raised in *Hammond v. Xerox Corp. Retirement Income Guarantee Plan*, No. CV 97-8349 (C.D.Cal. Apr. 7, 1999) (Byrne, J.), *aff'd for reasons given by district court*, 225 F.3d 662 (table), 2000 WL 728025 (9th Cir.2000). Rejecting that argument, the *Hammond* court reasoned that "[b]ecause the balances of an employee's TRA and CBRA accounts are so closely linked to the prior distributions, if any, from an employee's Retirement Account, it was not unreasonable for the plan administrator to construe distributions from the Retirement account prior to 1989 as distributions from the TRA and CBRA accounts for 'phantom accounting' purposes under §§ 1.8 and 1.40". *Id.*, slip op. at 23. I agree with that reasoning, and follow it here as well.

Unlike the 1993 and 1996 Restatements, the 1998

Restatement expressly provided for a phantom account offset for prior distributions not only from the CBRA and TRA, but also from the Retirement Account. Plaintiffs characterize the addition of this language as an "admission against interest" on defendants' part, *see* Clair Aff. ¶ 74, apparently on the theory that this constituted an implicit recognition that the Plan had not, since 1989 at least, provided for a phantom account offset as to prior distributions from the Retirement Account. I disagree. Since, beginning with Frommert's inquiries about his benefits in 1996, it had become apparent that there was some concern among Xerox employees about the phantom account offset, it is not surprising that Xerox sought to clarify how the offset operated by making the Plan language more explicit in that regard.

I recognize that defendants cannot avoid the notice requirements of § 204(h) simply by labeling an amendment as a "clarification," if in fact the amendment has the effect of significantly reducing the rate of future benefit accrual. *See, e.g., Pickering v. USX Corp.*, 809 F.Supp. 1501 (D. Utah 1992) ("a change in the terms of a pension plan, however the change was effected or termed, can be an amendment of the plan under § 1054(h), whether implemented as a plan amendment explicitly [or as] a 'clarification' ") (citing *Production and Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397 (7th Cir.1992) (additional citation omitted)). The point, however, is that the Plan had consistently, and in my view not unreasonably, been interpreted by the administrator as providing for a phantom account offset for prior distributions,

regardless of the source of those distributions. These various amendments and restatements, then, did not themselves reduce employees' benefits; they simply explained the calculation of those benefits in more detail.

Furthermore, even if these amendments did insert (or reinsert) a phantom account offset that had been absent from the 1989 Restatement, they do not reduce accrued benefits, or the rate of benefit accrual. Employees' benefits under the RIGP formula continued to accrue as before. Even assuming *arguendo* that the amendments put in place an offset that was missing from the 1989 Restatement, all that the amendments did was to increase the value of an employee's TRA and CBRA balances for purposes of comparing them with the employee's RIGP accrued benefit.

This conclusion also finds support in the *Hammond* decision. In *Hammond*, a retired Xerox employee also challenged the use of the phantom account offset, on a number of grounds. The district court granted summary judgment in favor of the Plan.

In so doing, the court rejected the plaintiff's contention that the RIGP was amended to reduce his accrued benefit rights in violation of 29 U.S.C. § 1054(g) ("The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan ..."). The plaintiff based that argument on the fact that the 1989 Restatement of the Plan did not expressly set forth the phantom account concept. Instead, that concept was introduced (actually, reintroduced, since the 1983 Restatement had contained a phantom account provision) in amendments to the Plan in 1990 and 1991.

The *Hammond* court agreed with the defendant that "the challenged amendments did not reduce plaintiff's retirement benefit.... Rather than decrease plaintiff's accrued benefits under the RIGP formula, the challenged amendments simply increased the value of the TRA and CBRA components to which they [sic] RIGP formula would be compared." Slip op. at 34.

Although the court in *Hammond* was not addressing the § 1054(h) notice requirement concerning amendments that provide for a significant reduction in the rate of future benefit accrual, but rather § 1054(g)'s prohibition against amendments that decrease an already-accrued benefit, the court's reasoning is nonetheless applicable in the case at bar. The simple fact is that the challenged amendments had *no* effect, much less a "significant" one, on benefit accrual.

This case thus stands in contrast to the reported cases which have found violations of § 204(h). In those cases, the facts showed that the plans in question were amended so as to reduce the rate of benefit accrual. *See, e.g., Davidson v. Canteen Corp.*, 957 F.2d 1404, 1407 (7th Cir.1992) (employer amended pension plan to exclude income earned in exercising stock options from definition of compensation used to compute retirement benefits); *Local 504,* 954 F.2d at 1399 (employer passed a written amendment that retroactively ceased accrual of benefits under the plan); *DiCioccio v. Duquesne Light Co.*, 911 F.Supp. 880, 899 (W.D.Pa.1995) (plan administrator effected change in plan which excluded certain types of income from definition of "compensation" that was used to calculate benefit

accrual); *Koenig v. Intercontinental Life Corp.*, 880 F.Supp. 372, 375 (E.D.Pa.1995) ("there is no doubt that a significant reduction [in the rate of future benefit accrual] occurred when [plaintiffs' previous employer's] plan was merged into [defendant's] plan" after defendant purchased employer from its former parent corporation).

Furthermore, it is undisputed that, even if prior notice of the amendments was not given, plaintiffs were given written notice no later than 1995, when the SPD for that year was distributed to Xerox employees. The 1995 SPD clearly informs participants that if they received a prior distribution, then

[i]n calculating your RIGP benefit for the purpose of determining the highest of your TRA, CBRA, or formula benefit, the amount of your prior distribution will be added to your TRA and CBRA accounts, along with hypothetical investment gains and/or losses attributable to the prior distribution, as if the money had been left in your accounts. However, since you already received the prior distribution and there were no actual investment gains and/or losses on this amount, the payment of your RIGP benefit will not include the prior distribution or any hypothetical investment gains and/or losses.

These statements could not have been clearer. *See Hammond,* slip op. at 25 ("This explanation clearly indicates that prior distributions will be *added* to the employee's retirement accounts for purposes of calculating his largest retirement benefit ... and *subtracted back out* before the retirement benefit is actually paid").

At worst, then, Xerox provided tardy notice of the amendment to its employees, but they did receive written notice well before any of plaintiffs' retirement benefits were actually calculated. They therefore could not have suffered any prejudice as a result, and I see no reason to ignore these clear provisions. *See Burke v. Kodak Retirement Income Plan,* 336 F.3d 103, 113-14 (2d Cir.2003) (ERISA plaintiff must show "likely prejudice" in order to recover for deficient SPD), *cert. denied,* --- U.S. ----, 124 S.Ct. 1046, 157 L.Ed.2d 890 (2004).

To hold that these amendments to the Plan *never* took effect, because timely notice was not given, would also not further the purpose of § 1104(h), which is "to give plan participants 'the opportunity to take advantage of an existing benefit before it is lost.' " *Scott v. Administrative Committee of the Allstate Agents Pension Plan,* 113 F.3d 1193, 1202 (11th Cir.1997) (quoting *Davidson,* 957 F.2d at 1407). In *Davidson,* for example, the employer amended the pension plan, without adequate prior notice to employees, to exclude income earned in exercising stock options from the definition of compensation that was used to compute retirement benefits. Unaware that the plan had been amended, the plaintiff employees exercised stock options, and thereby unwittingly substantially reduced their ultimate pension benefits.

No similar circumstances exist here. Plaintiffs have proffered no evidence indicating that they did, or refrained from doing, anything based on their alleged unawareness of the phantom account offset. Moreover, the fact that most of the plaintiffs have continued to work at Xerox, years after they learned

about the offset, indicates that even if they had been made aware of the offset years earlier, they would not have done anything differently (except perhaps to have commenced this lawsuit earlier).

It should also be noted that the 1995 SPD fully comports with the Second Circuit's decision in *Layaou*. The court there held that the 1993 SPD was inadequate because it did not fully explain the impact of prior distributions on benefit calculations. In so holding, the court observed that "[t]he SPD could have given sufficient notice, for example, by stating something like, 'Any future benefit will be offset by the appreciated value of any prior distribution assuming that amount remained in the plan,' or by providing an example calculating the benefits of an employee who had received a prior distribution." 238 F.3d at 211. As the court in *Miller* noted, "[t]he 1995 SPD almost mimics the Layaou Court's example" in this regard. *Miller*, slip op. at 11. Moreover, "from 1996 onward, the Value Added Statements included with the SPD contained an actual calculation of the offset." *Id.*

I conclude, therefore, that the operative plan here is not the 1989 Restatement of the Plan. Rather, the governing Plan is the one in effect when the relevant decision is or was made-typically, the *actual* determination of a participant's eligibility for benefits, and the amount of that benefit.

Moreover, even if the Court were to assess the reasonableness of the administrator's projections or estimates of plaintiffs' future benefits in 1996 or in other prior years, those calculations should not be judged by reference to the 1989 Restatement, but by whichever Plan was in effect at the time. The

evidence shows that the moving plaintiffs, Frommert and Clair, first inquired about what their benefits would be in 1996, and that after they challenged the application of the phantom account offset, their appeals were denied in 1996 and in 1999. The Plan has contained unequivocal language about the phantom account from 1993 onward, and the SPD has clearly advised employees of the phantom account offset since 1995. The reasonableness of the administrator's decisions concerning plaintiffs' benefits must therefore be judged against the Plan and SPDs as they were written at the time that plaintiffs' benefits were calculated and their appeals were denied.

III. Plaintiffs' Claim for Additional Benefits Under 29 U.S.C. § 1132(a)(1)(B)

Having rejected plaintiffs' contention that the Court should ignore the post-1989 amendments to the Plan, and having determined instead that the governing Plan, as to each plaintiff, is the one that was in effect at the time of the challenged decision, I also find that defendants' calculation of plaintiffs' benefits, through the use of the phantom account offset, was entirely proper and consistent with the plain language of both the Plan and the SPDs.

As stated, plaintiffs chiefly argue that the Court should ignore the various amendments dealing with the phantom account, and apply the terms of the 1989 Restatement, which, though it provided for nonduplication of benefits, did not expressly set forth the concept of the phantom account. For the reasons stated above, I have rejected that argument.

In the alternative, however, plaintiffs ask the Court

to enforce the terms of the 1993 and 1996 Restatements of the Plan, excluding any subsequent amendments to the Plan.[13] *See* Plaintiffs' Notice of Motion for Summary Judgment at 2. According to plaintiffs, the 1993 and 1996 Restatements, though they do contain provisions dealing with offsets, do not provide for a phantom account offset as to plaintiffs.

This argument is meritless. I see no reason why, having rejected plaintiffs' argument that the 1989 Restatement was improperly amended, the Court should decide that the 1993 and 1996 Restatements should govern plaintiffs' claims, even if the challenged decisions were made after subsequent restatements had been issued. Simply because (according to plaintiffs) application of the 1993 and 1996 Restatements would benefit plaintiffs is no reason to ignore later restatements of the Plan. Furthermore, to apply those plans would be contrary to the general rule that the controlling plan is the one in effect at the time of the challenged decision.

IV. Plaintiffs' Other Claims

For many of the same reasons already given, I also find that defendants are entitled to summary judgment on plaintiffs' claims for breach of fiduciary duty, and their claims under § § 1053 and 1054. First, my findings that the Plan was properly amended, and that notice of the challenged

---

[13] According to plaintiffs, the terms of the 1993 and 1996 Restatements do not differ in any material respects with regard to the offset provisions.

amendments was not statutorily required, disposes of plaintiffs' claim under 29 U.S.C. § 1054(h).

I also find that plaintiffs' claim under § 1054(g), which provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan ...," must be dismissed as well. As the court stated in *Hammond*, "the challenged amendments did not reduce plaintiff's retirement benefit.... Rather than decrease plaintiff's accrued benefits under the RIGP formula, the challenged amendments simply increased the value of the TRA and CBRA components to which they [sic] RIGP formula would be compared." Slip op. at 34.

For similar reasons, I also grant defendants' motion as to plaintiffs' forfeiture claim under § 1053(a)(2). That section provides that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age...." In addition, the plan must provide that any employee who has completed at least five years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

This claim is little more than a restatement of plaintiffs' other claims, inasmuch as it, too, is premised on plaintiffs' allegation that defendants wrongfully applied the phantom account offset when calculating plaintiffs' benefits. As explained, this did not reduce plaintiffs' accrued benefits, and no forfeiture occurred. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 512-17, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981) (ERISA's nonforfeiture provisions did not prohibit offset of pension benefits by workers' compensation awards; "the statutory

definition of 'nonforfeitable' assures that an employee's claim to the protected benefit is legally enforceable, but it does not guarantee a particular amount or a method for calculating the benefit"); *Hammond,* slip op. at 30 ("Although *Alessi* dealt with the question of whether benefits derived from sources external to the pension plan could be offset against amounts owed under the plan, its basic observations are even more compelling where previously distributed benefits under the plan itself are offset"). The purpose, and effect, of the offset is not to take away an earned benefit, but only to prevent a windfall to participants, which is exactly what would happen if prior distributions were ignored. *Hammond,* slip op. at 24.

Plaintiffs' remaining claim, for breach of fiduciary duty, must be dismissed as well. Although the complaint (perhaps artfully) avoids citing a statutory basis for this claim, but instead characterizes it as based on "common law principles applicable to trusts and fiduciaries ...," Complaint ¶ 111, this is essentially a claim under 29 U.S.C. § 1132(a)(3), which provides that a civil action may be brought for broad injunctive or equitable relief. *See Varity Corp. v. Howe,* 516 U.S. 489, 510, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996); *Burstein v. Retirement Account Plan For Employees of Allegheny Health Educ. and Research Foundation,* 334 F.3d 365, 384 (3d Cir.2003).

The Court has already dismissed plaintiffs' claims under that section, however, on the ground that all of the relief requested by plaintiffs could adequately be addressed under § 1132(a)(1)(B). *See Frommert,* 206 F.Supp.2d at 439. Plaintiffs cannot avoid that ruling

simply by recasting this as a claim under unspecified "common law principles," and it is dismissed for the reasons given in this Court's prior decision. *See Varity Corp. v. Howe,* 516 U.S. 489, 515, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) ("where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate' "); *Johnson v. Buckley,* 356 F.3d 1067, 1077 (9th Cir.2004) ("when relief is available under section 1132(a)(1), courts will not allow relief under § 1132(a)(3)'s 'catch-all provision'").

I add, however, that this claim, which is based largely on defendants' alleged failure to disclose the existence of the phantom account offset, is meritless as well. All the Plan participants were apprised of the offset no later than the issuance of the 1995 SPD, which, as Judge Byrne noted in *Miller,* "almost mimic[ked]" the Second Circuit's example of sufficient notice. *Miller,* slip op. at 11. Accordingly, this claim is untimely, since the original complaint in this action was filed in November 1999. *See* 29 U.S.C. § 1113(2) (three-year statute of limitations applies to breach of fiduciary duty claims, commencing on earliest date that plaintiff had actual knowledge of breach). In addition, plaintiffs have failed to present any evidence of "likely prejudice" from the previous inadequate disclosures. They have not indicated what they would have done differently had they been apprised of the offset sooner, nor is there any evidence that plaintiffs sought to change their employment when they did find out about the offset. Indeed, it appears that most of the plaintiffs

are *still* employed at Xerox. *See Miller*, slip op. at 12 (observing that there was no evidence that plaintiffs sought to switch their employment after their receipt of the 1995 SPD).[14]

CONCLUSION

The motion for summary judgment (Docket # 88) brought by plaintiffs Paul J. Frommert and Alan H. Clair is denied.

Defendants' motion for summary judgment (Docket # 95) is granted, and the complaint is dismissed.

IT IS SO ORDERED.

---

[14] Plaintiff Lawrence R. Holland has at all relevant times been an hourly (*i.e.*, non-salaried) Xerox employee, and apparently has never been a participant in the RIGP. For reasons that are not entirely clear, however, he contends that his retirement benefits are governed by the same provisions applicable to the other plaintiffs. Since Holland is not a moving plaintiff, and because I am dismissing the complaint, it is unnecessary for the Court to decide whether Holland's status as a non-salaried employee bars his claims for relief.

United States District Court, W.D. New York.

Paul J. FROMMERT, et al., Plaintiffs,

v.

Sally L. CONKRIGHT, Patricia M. Nazemetz and Lawrence M. Becker, Xerox Corporation Retirement Income Guarantee Plan Administrators and Xerox Corporation Retirement Income Guarantee Plan, Defendants.

No. 00-CV-6311L.

Jan. 24, 2007.

DECISION AND ORDER

DAVID G. LARIMER, United States District Judge.

INTRODUCTION

This decision constitutes the latest chapter in a long-running dispute between employees of Xerox Corporation and administrators of Xerox's retirement plan, the Xerox Corporation Retirement Income Guarantee Plan ("the Plan"), concerning calculation of retirement benefits. The dispute involves a relatively small group of employees who previously left employment at Xerox, received a lump-sum distribution upon their initial departure, and then were rehired by Xerox years later. Those employees are now contemplating retirement, or

have retired, and the issue in dispute is how their present retirement benefits should be calculated.

With respect to this group of rehired employees, the Plan is designed so that an employee's total years of employment at Xerox, regardless of whether there was a break in service, are counted in calculating the employee's retirement benefits. Generally, the relevant pension calculations are based on the employee's total years of employment times a percentage of the employee's five highest-paying calendar years with Xerox. Both sides in this litigation agree that to avoid duplication of benefits, some sort of offset against current benefits is necessary to reflect the employee's receipt of monies at the time of the prior separation from employment. Just how that offset against current benefits should be calculated, though, has been a matter of much dispute and has engendered a great deal of litigation.

Familiarity with this Court's several prior decisions involving these parties, *see* 328 F.Supp.2d 420 (W.D.N.Y.2004); 206 F.Supp.2d 435 (W.D.N.Y.2002), and also the Second Circuit's decision of January 6, 2006, 433 F.3d 254 ("Second Circuit decision") is presumed. These decisions set out in great detail the relevant facts and disputed issues between the parties. There is, therefore, no need to restate those matters here.

The Second Circuit decision, which was on an appeal from two of this Court's prior decisions dismissing some of plaintiff's claims and granting summary judgment in favor of defendants on the remaining claims, resolved many of the issues raised between the parties. The Second Circuit affirmed in part, reversed in part, and remanded the case to this

Court for further proceedings.

The Second Circuit held that the Plan's use of a so-called phantom account in determining present benefits violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101 *et seq.*, in several respects. First, the Plan's formula constituted a "retroactive cut-back" of benefits, 433 F.3d at 268, contrary to § 204(g) of ERISA. In addition, the court found that employees were not given proper notice in the Summary Plan Description ("SPD") of the nature and scope of the phantom account, at least prior to 1998, when the SPD was amended to include the phantom account and describe the offset procedure. *Id.* at 263, 269.

The Second Circuit determined that employees rehired after 1998 had sufficient notice as to the manner by which Xerox intended to treat their previous distribution. For those rehired prior 1998, though, the Second Circuit remanded to this Court and directed me to "utilize an appropriate pre-amendment [1998] calculation," *id.* at 268, without using the "phantom account," to determine current benefits.

Specifically, the Second Circuit directed as follows:

On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the Court, we suggest that it may wish to employ equitable principles when

determining the appropriate calculation in fashioning the appropriate remedy.

Id.

Subsequent to the Second Circuit's decision, the Court met with counsel to determine how best to proceed. The parties agreed to work together to see if they could resolve the issues remaining on remand. Although the parties appear to have spent some time attempting to reach a settlement, it is now apparent that they are unable, or unwilling, to settle.

The Court conducted a two-day hearing on the remedial issues raised by the Second Circuit and has received both pre-hearing and post-hearing memoranda from both sides. The parties have also discussed several cases from other jurisdictions dealing with similar issues. Having considered both sides' submissions and arguments, the Court now issues this Decision and Order concerning the issues before it on remand.

DISCUSSION

I. The Appropriate Calculation of Plaintiffs' Benefits

This Court's task on remand is made easier in many respects by the breadth of the Second Circuit decision. The Circuit resolved many issues and has clearly established the law of the case in many respects. For example, it can no longer be disputed that employees were not give proper notice in either the Plan or the relevant SPD as to the nature of the phantom account and its operation. Utilization of this phantom account or anything similar to it has been soundly rejected by the Court of Appeals in this

case as well as a previous case involving the same Plan, *Layaou v. Xerox Corporation,* 238 F.3d 205 (2d Cir.2001). Other courts have reached the same conclusion. *Miller v. Xerox Corp. Ret. Income Guarantee Plan,* 464 F.3d 871 (9th Cir.2006); *Berger v. Xerox Corp. Ret. Income Guarantee Plan,* 338 F.3d 755 (7th Cir.2003). It is clear, then, that Xerox may not lawfully use the phantom account mechanism, as to either the named plaintiffs in this lawsuit, or anyone else who was rehired by Xerox prior to 1998, after having previously received a distribution of pension benefits. The Second Circuit has addressed this issue more than once, and Xerox may not continue to utilize this rejected formula.

The Second Circuit also rejected Xerox's contention that a procedure utilizing a phantom account has always been a part of the Plan, even prior to 1998. 433 F.3d at 256. The Circuit determined that Xerox's use of the phantom account constituted a retroactive diminution of benefits, contrary to the law. *Id.* at 268. Furthermore, the Court of Appeals rejected Xerox's contention that it had properly amended the Plan and notified the Plan's participants concerning utilization of the phantom account, prior to 1998. *Id.* at 263.

Although the Circuit clearly precluded use of the phantom account in determining how to treat prior distributions, it did little to elucidate what formula *should* be adopted, except to suggest using an "appropriate pre-amendment calculation" guided by equitable principles in determining the appropriate remedy for affected employees. *Id.* at 268.

The problem is that if one removes the phantom account mechanism, there is little else remaining.

The Circuit expressly recognized this by noting the "difficulty" confronting the district court "because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated." *Id.* at 268.

Describing the procedures to be utilized prior to the 1998 amendments as "ambiguous" is generous. In fact, virtually nothing is set forth in either the Plan or the SPD as to the precise mechanism for taking into account a prior distribution in calculating an employee's present benefits after a rehire.

Some testimony at the hearing before me focused on the appropriate economic, financial and actuarial methods for treating prior distributions. But this Court is not charged with writing a sound retirement plan. Rather, I must interpret the Plan as written and consider what a reasonable employee would have understood to be the case concerning the effect of prior distributions. If the employee had no notice of the "phantom account," he also had no notice of some of the other mechanisms suggested by witnesses at the remand hearing before me. What is "best" from a financial or actuarial point of view is not what the Court has been charged with determining. The Court's task, as directed by the Court of Appeals, is simply to determine, based on the language of the Plan and the SPD, what benefits are now due this group of rehired employees.

To the extent that there is some ambiguity as to the precise manner by which prior distributions are to be offset from present benefits, it is Xerox, not the employees, who should suffer. *See Burke v. Kodak Ret. Income Plan,* 336 F.3d 103, 113 (2d Cir.2003) ("The consequences of an inaccurate SPD must be

placed on the employer"). It was defendants' obligation to provide a clear description, in the SPD and in the Plan itself, as to how those prior distributions would be treated. To the extent that the Plan was constituted, at Xerox's doing, to consider all prior years of service, defendants had the burden of elucidating precisely how that would be accomplished.

As noted by the Court of Appeals in this case, 433 F.3d at 258, the Plan does have a provision, § 9.6, dealing with "nonduplication of benefits." That section provides as follows:

Nonduplication of Benefits. In the event any part of or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, if Section 8.8 [dealing with incompetent beneficiaries] does not apply to such distribution and such Member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

"Accrued benefit," as used in § 9.6, is defined at § 1.1 as follows: The normal retirement benefit which a Member has earned up to any date, and which is payable at Normal Retirement Date in an amount computed in accordance with Section ... 4.3 [which sets forth the general method for calculating the normal retirement benefit], based, however, only upon Average Monthly Compensation received and Years of Participation rendered by a Member up to the date as of which the Accrued Benefit is computed....

As the Court of Appeals noted, there was no

description whatsoever as to the mechanics of this so-called phantom account. 433 F.3d at 258. For that reason, the Second Circuit and other courts rejected the administrator's utilization of such a mechanism in calculating benefits.

The SPD provides even less guidance than the Plan in this regard. As the Court of Appeals noted, the only notice in the SPD concerning non-duplication of benefits was the proviso that "the amount you receive may also be reduced if you had previously left the company and received a distribution at that time." *Id.* at 265 (citing *Layaou*, 238 F.3d at 210). The Court of Appeals in both *Frommert* and *Layaou* determined that this bare-bones notice failed to adequately apprise employees as to the phantom account mechanism.

In addition, as those and other cases make clear, where the Plan and the SPD conflict, the SPD controls. *See Burke*, 336 F.3d at 110; *Frommert*, 433 F.3d at 265. *Accord Tocker v. Philip Morris Companies, Inc.*, 470 F.3d 481, 487-88 (2d Cir.2006); *Demirovic v. Building Service 32 B-J Pension Fund*, 467 F.3d 208, 210 n. 1 (2d Cir.2006); *Bouboulis v. Transport Workers Union of America*, 442 F.3d 55, 61 (2d Cir.2006).

The question, then, is what, in light of these vague provisions in the Plan and SPD, this Court should to do to remedy the violation of ERISA. I believe that the best course is to do what I did previously in *Layaou* involving a similar remand from the Court of Appeals. *Layaou v. Xerox Corporation*, 330 F.Supp.2d 297 (W.D.N.Y.2004). In *Layaou*, I directed the administrator "to recalculate plaintiff's retirement benefit, ... and to pay plaintiff a lump sum in the

amount of the difference between the amount of benefits that plaintiff has received, and the amount of the recalculated benefit, without any consideration of a 'phantom account.' " *Id.* at 305 (footnote omitted). I added that "[i]t would not be unreasonable ... for the administrator to subtract out the amount of the prior distribution," in order to avoid giving the plaintiff a windfall, but left it to the Plan administrator to perform the actual calculation of the plaintiff's benefits in the first instance, stating that "[i]f plaintiff believes that the administrator's calculation is erroneous, and the matter cannot be resolved between the parties, he can seek further relief in this Court." *Id.* at 304.

The same process should apply here. This process is straightforward; it adequately prevents employees from receiving a windfall, and I believe it most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD. Again, if there is some doubt or ambiguity as to this formula, it must be resolved in favor of the employee. *See Lifson v. INA Life Ins. Co. of New York,* 333 F.3d 349, 353 (2d Cir .2003) (in reading an ERISA plan, "[w]e construe ambiguities against the drafter and in favor of the beneficiary"); *Perreca v. Gluck,* 295 F.3d 215, 223 (2d Cir.2002) ("absent evidence indicating the intention of the parties, any ambiguity in the language used in an ERISA plan should be construed against the interests of the party that drafted the language").

In so ruling, I also reject defendants' suggestion that the phantom account offset can properly be applied to *all* employees' accrued benefits earned *after* 1998, regardless of when the employees were rehired. As

defendants themselves note, the Second Circuit's statement that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD," 433 F.3d at 263, "does not expressly contain this limitation," Defendant's Pre-Hearing Brief Addressed to Remedies, Dkt. # 121-1 at 23, and I decline defendants' invitation to infer such a limitation from that apparently categorical statement. The Court of Appeals gave this Court specific directives on remand, and determining whether the phantom account offset should apply to post-1998 earned benefits of employees rehired prior to that date was not among those directives.

II. Which of the Plaintiffs Were Rehired by Xerox after the Plan Was Amended in 1998

The Court of Appeals also directed the district court "to determine which of the plaintiffs were rehired by Xerox after the Plan was amended to include the phantom account and thus can be bound by its terms." 433 F.3d at 269. This directive relates to the Second Circuit's holding that "for employees rehired subsequent to the amendment of the Plan through the 1998 SPD, the phantom account is a component of the Plan that they joined and thus may permissibly be applied to them." *Id.* at 263. As the court explained,

[e]mployees hired after this amendment to the Plan occurred, unlike those rehired before then, became Plan participants under the terms of the amended Plan. As such, the phantom account may permissibly be applied to them. With full notice of the phantom account's existence, these rehired employees, unlike their predecessors who lacked such information, had the opportunity to make an informed decision about

taking or leaving the terms of the deal offered to them under the Plan.

Id. at 269. That matter does not appear to be in dispute, however, and I presume that the parties will be able to agree on whether each employee was rehired prior to or after the 1998 amendment date. If the parties are unable to agree about whether a particular employee was rehired prior to that, they may seek a determination of that question from the Court.

III. Effect of the Releases Signed by Twenty-Two Plaintiffs

On January 5, 2001, plaintiffs' counsel filed a motion for "emergent injunctive relief," seeking relief in connection with Xerox's offer to plaintiffs to accept the termination of their employment as part of a reduction in force ("RIF"), and to sign a general release waiving any existing or potential claims they might have had against Xerox-including ERISA claims-in exchange for salary continuance, a form of severance benefit in which the employee would continue to receive his full, regular salary for a specified period even after he stopped working at Xerox.

In his affidavit in support of that motion, plaintiffs' attorney, Robert H. Jaffe, Esq., characterized Xerox's offer as a form of discrimination against his clients based on their exercise of their rights under ERISA by filing or joining this lawsuit challenging defendants' use of the phantom account offset. Dkt. # 47 ¶ 2.

In his affidavit, Jaffe noted that the proposed release "includes a waiver or withdrawal of any claims that

were made or could have been made by [plaintiffs] for recalculation of retirement benefits under ERISA." *Id.* ¶ 5. He added that "[t]he form of general release which Xerox has asked at least five clients of my law office to execute explicitly includes a release of all claims under ERISA." *Id.* ¶ 8.

Jaffe stated that as of the date of the affidavit, five of his clients, three of whom were then named plaintiffs in this action, had asked him to review the proposed release "and suggest an alternative which would avoid a waiver of their rights under ERISA," at least until the Second Circuit issued a decision in *Layaou,* which was then pending before the Court of Appeals.[1] *Id.* ¶ 9. Jaffe stated that he had drafted a revised release containing language "which carves out from its scope the waiver of pending ERISA claims for recalculation of retirement benefits." *Id.* ¶ 10. Jaffe said that his clients had presented the revised release to Xerox, but were told by Xerox that "it was unacceptable." *Id.*

After hearing oral argument, this Court denied plaintiffs' motion in open court on January 11, stating in effect that I saw no ERISA violation in an employer's conditioning an offer of severance benefits on a release of ERISA claims. *See* Dkt. # 53 at 38-42.

Twenty-two of the 104 named plaintiffs did subsequently sign the releases and were terminated in a RIF in exchange for salary continuance. Dkt. #

---

[1] The Second Circuit's decision remanding *Layaou* was issued about two weeks after plaintiffs filed their motion, on January 18, 2001.

133-7. Although the exact language used varies somewhat among the releases, in general they state that the employee "release[s] Xerox from any and all claims, even if [the employee] d[oes]n't know about the claim at this time, based on anything that has occurred prior to the date [the employee] sign[s] this Release."[2] The releases expressly referenced a number of types of claims covered by the release, including ERISA claims. With certain exceptions not relevant here, the releases also provided that the employee agreed not to "file or pursue any charge or claim with any governmental agency or any court against Xerox based on anything that occurred before [the employee] signed this Release." *Id.*

Each release also states that the employee "acknowledge[s] and agree[s] that the consideration set forth in this Release is in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." *Id.* Four of the releases, however, contain additional language carving out an exception for plaintiffs' claims in this action: "I acknowledge and agree that the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy, including my right to a pension under the Xerox Retirement Income Guarantee Plan to which I do not release my claim as a member of the Frommert lawsuit." *Id.* at 49, 57, 69, 88.

---

[2] "Xerox" is defined by the releases to include, *inter alia*, "the Xerox employee benefit plans" in which the employee was a participant, as well as the trustees and administrators of those plans. Dkt. # 133-7.

Plaintiffs now contend that the execution of these releases, even the ones without a specific exclusion for the claims in this lawsuit, does not bar any of them from pursuing their ERISA claims in this action. Plaintiffs contend that the releases are ambiguous in certain respects, and therefore unenforceable.

As a preliminary matter, I note that plan participants can waive ERISA claims, and that such waivers will be enforced as long as they are knowing and voluntary. *See, e.g., Laniok v. Advisory Committee of Brainerd Mfg. Co. Pension Plan,* 935 F.2d 1360, 1367 (2d Cir.1991) ("the age discrimination provision of ERISA does not prohibit an individual waiver of pension plan participation by an older employee, ... so long as the waiver is knowing and voluntary"); *Mange v. Petrolite Corp.,* 960 F.Supp. 206, 209 (E.D.Mo.1997) ("Under ERISA, a release of claims by plan participants is valid so long as it is knowing and voluntary"). There is also authority that "[a] settlement agreement that releases legal claims in exchange for severance benefits may be enforced under ERISA." *Seman v. FMC Corp. Ret. Plan,* 334 F.3d 728, 731-32 (8th Cir.2003); *see also Smart v. Gillette Co. Long-Term Disability Plan,* 887 F.Supp. 383, 386 (D.Mass.1995) (employee knowingly, intentionally, and voluntarily agreed to a severance plan that included a general release which precluded her ERISA claim), *aff'd,* 70 F.3d 173, (1st Cir.1995).

The Second Circuit has cautioned, however, that "[t]he validity of an individual's waiver of pension benefits is subject to closer scrutiny than his or her

waiver of general contract claims." *Finz v. Schlesinger,* 957 F.2d 78, 81 (2d Cir.1992), *cert. denied,* 506 U.S. 822, 113 S.Ct. 72, 121 L.Ed.2d 38 (1992); *accord Sharkey v. Ultramar Energy Ltd.,* 70 F.3d 226, 231 (2d Cir.1995). Courts should look to the "totality of circumstances" to determine whether a release is knowing and voluntary. *Sharkey v. Ultramar Energy Ltd., Lasmo plc, Lasmo (AUL Ltd.),* 70 F.3d 226, 231 (2d Cir.1995).

The relevant factors to consider in this analysis include: (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the release before signing it; (3) the plaintiff's role in deciding the terms of the release; (4) the clarity of the release; (5) whether the plaintiff was represented by or consulted an attorney; (6) whether the consideration given in exchange for the employee's waiver exceeds benefits to which the employee was already entitled by contract or law; (7) whether the employer encouraged the employee to consult an attorney; and (8) whether the employee had a fair opportunity to do so. *Bormann v. AT & T Communications, Inc.,* 875 F.2d 399, 402-03 (2d Cir.), *cert. denied,* 493 U.S. 924, 110 S.Ct. 292, 107 L.Ed.2d 272 (1989). These factors are not exhaustive, and all need not be satisfied before a release is deemed enforceable. *Id.*

Here, some of these factors, such as the time (45 days) that plaintiffs had to consider whether to sign the release, and Xerox's encouragement to them to consult an attorney before signing, weigh in favor of enforcement of the releases. Other factors, however, are more troubling, particularly the clarity of the release and the consideration given by Xerox in

exchange for the releases.

Paragraphs 3 and 4 of the releases generally provide that the employee releases Xerox from any and all employment-related claims.[3] Paragraph 3 states that the employee "release[s] Xerox from "any and all claims ... based on anything that has occurred prior to the date" on which the employee signed the release, and paragraph 4 states that the employee "also release[s] Xerox from claims based on [any federal, state or local law] concerning employment...." Paragraph 3 lists ERISA claims as one of the types of claims waived by the employee. Read literally, this could be construed to mean that the employee was waiving *any* claim under ERISA, based on anything that occurred prior to the date on which he signed the release.

As stated, paragraph 5 states that the consideration set forth in the release, *i.e.*, Xerox's agreement to provide the employee with salary continuance, is "in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." This provision was presumably included in the release in order to conform to the requirements of the Older Workers Benefit Protection Act ("OWBPA"), which was enacted by Congress to modify the Age Discrimination in Employment Act ("ADEA") in

---

[3] These numbers refer to Xerox's standard release form for participation in a voluntary RIF. *See, e.g.*, Dkt. # 133-7 at 47. The numbering varies somewhat among the releases signed by plaintiffs (some of whom were terminated in involuntary RIFs), though the provisions are essentially the same.

certain respects, *see Meacham v. Knolls Atomic Power Laboratory,* 461 F.3d 134, 150 (2d Cir.2006).

The OWBPA provides in part that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary," and that in general "a waiver may not be considered knowing and voluntary unless at a minimum" certain conditions are met, one of which is that "the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled...." 29 U.S.C. § 626(f).

The import of paragraph 5 is that the salary continuance given to the employee did not take the place of, but was in addition to, any benefits to which the employee was *already* entitled by law or Xerox policy. This suggests that the employee was *not* waiving his right to such benefits. If he were, it would make little sense to describe his salary continuance as being "in addition to" such benefits.

Read that way, the releases would not bar plaintiffs' claims here. If plaintiffs were entitled to pension benefits under the law, *i .e.,* ERISA, or under Xerox's own policies, they did not waive their rights to such benefits. Furthermore, while it might be argued that there is a distinction between a right to pension benefits in general and a "claim" seeking to have those benefits calculated according to a particular formula, that is a distiction without a difference here, because the Second Circuit has now held that, at least with respect to employees rehired before 1998, Xerox's "reduction of justified expectations of benefits [by using the phantom account] took the form of a retroactive cut-back in violation of"

ERISA.[4] 433 F.3d at 268. In other words, those employees were "entitled by law" not simply to receive *some* pension benefits, but to have their benefits calculated without any reduction attributable to a "phantom" account.

Even if some other interpretations of the releases might be plausible, the releases are at the very least ambiguous as to what the employee was giving up in exchange for salary continuance. Section 5 may have been added primarily to comply with the OWBPA, but it cannot be ignored, and when read in conjunction with paragraphs 3 and 4, it appears to create some doubt about whether the release truly covered all ERISA claims, especially the proper calculation of benefits to which the employee was entitled.[5]

---

[4] ERISA's anti-cutback rule provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." 29 U.S.C. § 1054(g)(1).

[5] I recognize that there is authority that noncompliance with the OWBPA does not automatically invalidate a release as to non-ADEA claims. *See Chaplin v. Nationscredit Corp.*, 307 F.3d 368, 375 (5th Cir.2002); *Kaminski v. CoreStates Fin. Corp.*, No. CIV. A. 98-CV-1623, 1998 WL 800536, at *3 (E.D.Pa. Nov.18, 1998). That does not make such noncompliance irrelevant, however. The requirements of the OWBPA were intended by Congress to ensure that an employee's waiver of his rights be "knowing and voluntary." 29 U.S.C. § 626(f)(1). Thus, an employer's tendering of consideration that does not exceed the value of anything to which the employee was already entitled is some evidence that the employee's waiver executed in exchange for that consideration was not knowing and voluntary.

I recognize that these releases were signed during this litigation, and that in plaintiffs' January 5, 2001 motion for injunctive relief, plaintiffs' own counsel expressed his concern that the releases would constitute "a waiver or withdrawal of any claims that were made or could have been made by [plaintiffs] for recalculation of retirement benefits under ERISA." Certainly these facts could suggest that at least some of the parties understood the releases to cover their claims in this lawsuit. That does not alter the fact, though, that by its terms, the release appears to except from the scope of the waiver any benefits to which the employee is legally entitled. Under Xerox's interpretation, the Plan administrator could refuse to pay an employee *any* pension and, by dint of the release, the employee could do nothing about it. Again, any ambiguity on that score should be resolved against Xerox, which drafted the releases. *Lifson,* 333 F.3d at 353; *see also Albany Savings Bank, FSB v. Halpin,* 117 F.3d 669, 674 (2d Cir.1997) ("ambiguities in contracts should be construed against the drafter").

Furthermore, if it had been the parties' mutual understanding that the releases covered all of plaintiffs' claims in this litigation, it would have been a simple enough matter for Xerox to have included language to that effect in the releases. *See, e.g., Morais v. Central Bev. Corp. Union Employees' Supplemental Ret. Plan,* 167 F.3d 709, 711 (1st Cir.1999) (enforcing settlement agreement and release that expressly stated that plaintiff had directed his union to withdraw his grievance and demand for arbitration over disputed benefits). A single sentence would have clarified the matter. That

some of the *plaintiffs* added language to their releases making clear that the releases did not cover their claims in this action demonstrates how easy it would have been for Xerox to insert language in the other releases to include the employees' claims in this particular case, which was already in litigation.[6]

The omission of any mention of this lawsuit is, in one sense, not surprising, though it is still worth noting. On their face, these releases (other than the ones to which some plaintiffs inserted language expressly excepting their claims in this case from the scope of the release) do not appear to have anything to do with this litigation. Rather, they appear to be standard release forms given to all employees who choose to participate in a RIF, and are aimed at foreclosing the possibility of the employee's later assertion of claims relating to his termination in the RIF. In an effort to make them comprehensive, the release form lists an array of statutes, including ERISA, that it is intended to cover, but otherwise there is no suggestion that plaintiffs' claims in this case, or any other particular claims, were being waived. On the contrary, the reference to the stated consideration being "in addition to anything of value to which [the employee is] entitled by law or Xerox

---

[6] One could argue, of course, that the language added by several plaintiffs excluding their claims in *Frommert* suggests that the other releases *did* cover those claims. That some plaintiffs chose to insert language clarifying what they understood to be the scope of the release, however, sheds little light on the meaning of the other plaintiffs' releases, which remain, at best, ambiguous on that score.

policy" suggests that the employee did *not* waive any then-pending claims alleging an entitlement to some particular benefits.

Another factor that the Second Circuit has directed courts to consider in deciding whether a waiver is enforceable is whether the consideration given in exchange for the employee's waiver exceeds benefits to which the employee was already entitled by contract or law. *Bormann,* 875 F.2d at 403. In the case at bar, it appears that, at least with respect to some of the plaintiffs, the consideration received by the plaintiffs, *i.e.,* salary continuance, amounted to far less than they would have received under the Plan without the phantom account offset. In the case of plaintiff Pietrowski, for example, it appears that his prior lump-sum payment at the time of his first separation, plus his severance pay at the time of his second separation, totaled about $210,000, but that he would have received over $832,000 as a lump-sum payment of his standard Plan annuity. *See* Dkt. # 130-2 Ex. D.

Defendants do not appear to dispute that the plaintiffs in question received less than they would have without the phantom account offset; they simply contend that the consideration received was substantial, and that in any event, the disparity is not as great as plaintiffs contend because defendants' proposed remedial approach would still result in a lesser benefit than what plaintiffs seek. Of course, I have rejected that remedial approach.

The consideration received by plaintiffs here-in some cases up to a year's salary-was not insignificant. In light of the Second Circuit decision, however, it cannot be said that these benefits exceeded what

plaintiffs were entitled to by law, *i.e.*, pension benefits calculated without a phantom account offset. While it is true that plaintiffs did not know, at the time that they signed the releases, what the ultimate result of this litigation would be, both they and Xerox knew that plaintiffs were pursuing ERISA claims for amounts far greater than what Xerox was offering them in exchange for signing the releases.[7] This at least casts some additional doubt on whether the releases were entered into knowingly and voluntarily with respect to plaintiffs' ERISA claims. *See Unum Life Ins. Co. of America v. Cappello,* 278 F.Supp.2d 228, 236 (D.R.I.2003) (value of consideration that plan participant received, though "not an insubstantial sum," did not match what issuer of plan contended she waived by entering into severance agreement, since it was likely that amount of benefits to which she would have been entitled would have been substantial).

I also note that paragraph 3 only releases Xerox from claims "based on anything that ha[d] occurred prior to the date" on which the release was signed. Arguably, that language did not cover plaintiffs' later receipt of benefits, in amounts less than that to

---

[7] It appears that one plaintiff, Matthew Alfieri, signed his release on October 27, 2006, after the Second Circuit decision was issued. Dkt. # 133-7 at 46. I see no reason for this Court to rule any differently as to Alfieri, however. If anything, the Second Circuit decision had by that point made it even clearer that Alfieri, like the other plaintiffs, was entitled to calculation of his pension benefit without the phantom account offset, and therefore that he was not waiving his claim in that regard.

which they claim they are entitled, due to the use of the phantom account offset. At the time the releases were signed, plaintiffs had not yet left Xerox's employ, and had only received projections of what their benefits would be. Again, that is not the only reasonably interpretation; one could also argue that in light of the existence of this lawsuit challenging that very offset, everyone involved understood the releases to cover any claims concerning the offset. But this nonetheless adds to the ambiguity of the scope of the release, which should not be resolved against plaintiffs.

IV. Breach of Fiduciary Duty

In its decision in this case, the Court of Appeals concluded that there was a triable issue of fact as to "whether the defendants had fiduciary obligations under ERISA and if so whether they breached them...." 433 F.3d at 271. The court stated that

> [o]n remand, the district court should permit a trier of fact to assess (1) whether the defendants acted in a fiduciary capacity when they communicated with the Plan's beneficiaries about the implementation of the phantom account, and (2) whether those communications contained affirmative misrepresentations of fact concerning the Plan or breached the defendants' duty to deal fairly with the Plan's beneficiaries.

Id. at 271-72. The court also "direct[ed] the district court that if the plaintiffs prevail on this claim, it must determine what 'appropriate equitable relief' is necessary." *Id.* at 272.

Although it might appear difficult to reconcile this directive with the Court of Appeals' holding that

"[b]ecause adequate relief is available under [§ 502(a)(1)(B), which allows a plan participant 'to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan'], there is no need on the facts of this case to also allow equitable relief under § 502(a)(3)," 433 F.3d at 270, I find it unnecessary to resolve any apparent contradiction in that regard, since plaintiffs do not appear to seek any equitable relief on remand, other than relief which either this Court has effectively granted, or which the Second Circuit has already found to be unwarranted.

Plaintiffs do contend that the Court should rule that the Second Circuit's decision in this case is "class-based," and that it "encompasses all rehired Xerox employee rehired prior to the publication of the September 1998 SPD," Dkt. # 129-1, but to the extent that plaintiffs seek some sort of declaratory or injunctive relief in that regard, the Second Circuit has held that this is not a proper case for such relief. As stated, the Court of Appeals held that "the necessary remedies can be fully provided under § 502(a)(1)(B)," 433 F.3d at 269, and concluded that "sweeping relief" in the form of a judgment declaring that the phantom account is prohibited by ERISA and enjoining its application in calculating the benefits of any Plan participants was "not warranted," *id.*[8]

---

[8] If plaintiffs' use of the term "class-based" is meant to imply that the Court should grant some "class"-wide relief, that request is also denied. This is not a class action, nor have (continued...)

Having said that, the rulings contained both in the Second Circuit decision and in this Decision and Order *do* seem applicable to all Xerox employees who are similarly situated to the named plaintiffs. Leaving aside any particularized defenses that the Plan might have against individual employees, I do not see how defendants could continue to utilize the phantom account as to such employees without running afoul of the Second Circuit's holding that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD." 433 F.3d at 263. The clear import of the Second Circuit's decision is that utilization of the phantom account with respect to employees rehired before the 1998 Plan amendment violates ERISA. But neither this Court, nor apparently the Second Circuit, sees any basis for granting equitable relief in that regard at this time.

I also note that the purported basis for plaintiffs' claim for breach of fiduciary duty appears to have shifted somewhat over the course of this litigation. Originally, plaintiffs alleged that "defendants breached their fiduciary duty to Plan participants by publishing and supplying misleading information in SPDs, annual Personal Benefits Statements and in response to the plaintiffs' requests for clarification of their rights under the Plan." 433 F.3d at 270. On remand, however, this claim seems to focus largely if not entirely on the releases signed by some of the plaintiffs. Specifically, plaintiffs now contend that

---

plaintiffs ever presented it as, or sought to make it a class action.

defendants breached their fiduciary obligation to disclose to those Plan participants who signed the release "that implementation of the phantom account offset violates ERISA § 204(g) and ERISA § 204(h) and further that the consideration paid for executing the release was substantially less than the retirement benefits to which they may be entitled to receive [sic] if the phantom account offset was not applied." Dkt. # 129-1 at 15.

In any event, the relief that plaintiffs now seek is simply a ruling by this Court that the releases are unenforceable against plaintiffs insofar as it purports to waive claims for "enhanced" retirement benefits, *i.e.*, benefits calculated without using the phantom account offset. *See id.* at 19. That is essentially what the Court has done. Plaintiffs are getting all of the relief, equitable or otherwise, to which they are entitled. There is no need, therefore, to rule on plaintiffs' claim for breach of fidudiary duty.

V. Plaintiff Holland

Plaintiff Lawrence R. Holland has at all relevant times been an hourly (*i.e.*, non-salaried) Xerox employee who is covered by the terms of a collective bargaining agreement. Defendants contend that as such, Holland has never been a participant in the Plan, which by its terms excludes from its coverage "[a]ny person covered by a collective bargaining agreement, the terms of which do not require coverage under this Plan...." Dkt. # 121-5 at 6. Therefore, defendants contend, Holland lacks standing to sue for benefits under the Plan.

In response, plaintiffs do not appear to deny that

Holland is a participant in a different pension plan from the one at issue in this case, but contend that the plan in which he is a participant utilizes the same phantom account offset as the Plan covering the other plaintiffs. The essence of plaintiffs' argument seems to be that the Court should simply allow Holland's claims to go forward in this case so that hourly Xerox workers will be able to benefit from the Second Circuit's rulings in this case and the relief ordered by this Court with respect to the other named plaintiffs.

Holland's request must be denied. It is axiomatic that only plan participants and beneficiaries may sue for benefits under § 1132(a)(1)(B). *See Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100-01 (2d Cir.2005) (citing *Franchise Tax Board v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)). Holland's suggestion that the Court allow the administrators of his plan to be joined as defendants in this action is denied, as plaintiff has shown no basis for adding additional defendants in this case at this late date. Plaintiffs' contention that defendants have only recently raised the argument that Holland is not entitled to any benefits under the Plan is contradicted by this Court's July 30, 2004 Decision and Order, in which I expressly referenced (but found it unnecessary to decide) defendants' arguments to that effect, 328 F.Supp.2d at 439 n. 14. Furthermore, plaintiffs have made no motion to amend the complaint to add additional defendants, and plaintiffs' memoranda and other papers on

remand are not a proper vehicle for making such a request.[9]

VI. Plaintiffs' Motion to Amend the Complaint

On November 6, 2006, plaintiffs filed a motion for leave to file a second amended and consolidated complaint, adding a number of additional plaintiffs in this case. The gist of the motion was that following the remand from the Second Circuit, additional Xerox employees who had been separated from and then rehired by Xerox prior to 1998 contacted plaintiffs' counsel, seeking to join in or obtain the benefits of this lawsuit. Plaintiffs' counsel wrote to the Plan administrator, essentially asking him to waive these individuals' exhaustion requirements under ERISA and apply the rulings of this Court and the Court of Appeals in this case and in *Layaou* to these additional Plan participants. Dkt. # 132-3 at 1-4. The administrator's response was, essentially, that until a "final resolution" of this action, the phantom account offset would continue to be applied to all Plan participants, with "no exception or deviation." *Id.* at 5.

To the extent that any of the proposed new plaintiffs have not yet retired from Xerox, I see no basis for adding them to this lawsuit. As stated earlier, the Second Circuit's holding that "the phantom account

---

[9] It would seem to be beyond dispute, though, that use of a "phantom account" in the manner found unlawful by the Second Circuit decision violates ERISA and cannot be used by *any* plan. It is presumed that no plan administrator would knowingly violate ERISA.

may not be applied to employees rehired prior to the issuance of the 1998 SPD," 433 F.3d at 263, would certainly seem to foreclose defendants from utilizing the phantom account in calculating "new" retirees' pension benefits.

At this point, however, this motion has not been briefed by defendants, and since there may be issues involving individualized defenses or other matters bearing upon the motion to amend, I will not decide the motion at this time, but will instead reserve decision after the matter has been fully briefed, as set forth in the Conclusion of this Decision and Order.

CONCLUSION

Plaintiffs' motion for a determination of the decision of the Second Circuit Court of Appeals and for other further relief (Dkt.# 129) is granted in part and denied in part, and defendants' cross-motion for partial summary judgment (Dkt.# 133) is granted in part and denied in part. Defendants are hereby directed to recalculate plaintiffs' retirement benefits, consistent with the terms of this Decision and Order and the January 6, 2006 decision of the Court of Appeals for the Second Circuit, and to pay each plaintiff a lump sum in the amount of the difference between the amount of benefits that each plaintiff has received, and the amount of the recalculated benefit, without any consideration of a "phantom account." Plaintiffs' claim for breach of fiduciary duty is denied as moot. Plaintiff Lawrence Holland's claims are dismissed in their entirety.

Defendants are directed to respond to plaintiffs' motion for an extension of time to file a second

consolidated and amended complaint (Dkt.# 132) within thirty (30) days after the date of issuance of this Decision and Order. Plaintiffs shall file reply papers no later than fifteen (15) days after the date that defendants' response is filed.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURTHOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the day of September two thousand and eight.

Paul J. Frommert, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkim, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillian, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski,

Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Kenneth W. Pietrowski, Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Dennis E. Bains, Kathleen F. Hunter, John L. Crisafulli, Deborah J. Davis, Brenda H. McConnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Claudette M. Long, Dale Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Carter, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Gail J. Levy, John A. Williams, Crystal Thorton, Charles R. Drannbauer, William M. Burritt and Janice Ross Heiler.

Plaintiff-Appellees

v.

ORDER
No. 07-0418-cv

Sally L. Conkright, Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, Xerox Corporation Pension Plan Administrator, Lawrence M. Becker, Xerox Corporation Plan Administrator, Xerox Corporation Retirement Income Guarantee Plan and Xerox Corporation, a New York Corporation,

Defendant-Appellants,

Xerox Corporation,

Defendant,

Appellants, Sally L. Conkright, Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, et al., having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk

By: /s/
Richard Alcantara, Deputy Clerk

[Stamped as Filed on September 25 2008]

ERISA Section 502(a)(1)-(3)

TITLE 29 -- LABOR

CHAPTER 18 -- EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

. . .

Sec. 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to

obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

. . .

Xerox Corporation

Retirement Income Guarantee Plan

1989 Restatement

ARTICLE 1

Definitions

When used herein, the words and phrases defined hereinafter shall have the following meaning unless a different meaning is clearly required by the context of the Plan. Except when otherwise indicated by the context, any masculine terminology herein shall also include the feminine and neuter, and the definition of any term herein in the singular may also include the plural.

Section 1.1. Accrued Benefit. The normal retirement benefit which a Member has earned up to any date, and which is payable at Normal Retirement Date in an amount computed in accordance with Section 4.2. or 4.3, based, however, only upon Average Monthly Compensation received and Years of Participation rendered by a Member up to the date as of which the Accrued Benefit is computed; provided, however, that for a Member who is a highly compensated employee within the meaning of Section 414(q)(1)(A) or (B) of the Code, such benefit shall be no less than the normal retirement benefit which such Member earned up to December 31, 1988, payable at Normal Retirement Date in an amount computed in accordance with Section 4.2 of the Plan's provisions

in effect as of December 31, 1988 and, for a Member who is not a highly compensated employee within the meaning of Section 414(q)(1)(A) or (B) of the Code, such benefit shall be no less than the normal retirement benefit which such Member earned up to December 31, 1989, payable at Normal Retirement Date in an amount computed in accordance with Section 4.2 of the Plan's provisions in effect as of December 31, 1988.

. . .

ARTICLE 4

Normal Retirement Benefits

. . .

Section 4.2. Retirement Benefits for Members Who Retire on or before December 31, 1989. An eligible Member who retires on or before December 31, 1989 shall be entitled to a monthly normal retirement benefit of the largest of a, b or c below, plus d below.

a. One and four-tenths percent (1.4%) of Average Monthly Compensation of the Member multiplied by the number of full and fractional Years of Participation up to thirty less

(i) the monthly amount which would be payable under a Life Annuity which could be purchased with the Member's Retirement Account assuming commencement of such annuity at the same time as the commencement of benefits under the Plan and using the Actuarial Factors, provided, that for purposes hereof, with respect to those Members who were "Principals" or "Associates" of Xerox Development Corporation, it shall be assumed that the Member's Retirement Account includes any

amount which would have been contributed had the Member been a participant in the Profit Sharing Plan on July 1, 1977, or the first date such Member would otherwise have been eligible to commence participation in the Profit Sharing Plan, whichever is later.

(ii) the vested accrued monthly benefit which would be payable as a Life Annuity under the XDS Retirement Income Plan assuming commencement of such benefit at the same time as the commencement of benefits under the Plan.

(iii) the vested accrued monthly benefit which would be payable as a Life Annuity from Company contributions under Equitable Group Annuity Contract No. AC-158 assuming commencement of such benefit at the same time as the commencement of benefits under the Plan.

(iv) the vested accrued monthly benefit which would be payable as a Life Annuity under any TIAA-CREF Policy to which the Company or any of its predecessors made contributions assuming commencement of such benefit at the same time as the commencement of benefits under the Plan.

(v) the vested accrued monthly benefit which would be payable as a Life Annuity under the ACTWU Plan assuming commencement of such benefit at the same time as the commencement of benefits under the Plan.

(vi) the vested accrued monthly benefit which would be payable as a Life Annuity from the respective central pension funds maintained by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the

International Printing and Graphics Communications Union, the Columbus Typographical Union and the Graphic Arts International Union and 50% of the vested accrued monthly benefit which would be payable as a Life Annuity from the central pension fund maintained by the International Union of Operating Engineers.

(vii) the Member's monthly normal retirement benefit under Section 11.9.

b. One percent of Average Monthly Compensation of the Member multiplied by the Member's full and fractional Years of Participation less the amounts specified in subsections a(i), a(ii), a(iii), a(iv), a(v), a(vi) and a(vii) of this Section 4.2.

c. The benefit which would have been payable at Normal Retirement Date accrued at the time of an earlier termination of employment of the Member, if any.

d. With respect to individuals who were both Employees and Members at any time between January 1, 1982 and November 17, 1982 (other than any such individual who on or before May 29, 1986 terminated employment with the Employer before completing ten Years of Service) and who, upon retirement, will be entitled to a normal retirement benefit under Section 4.2a, b or c of the Plan, an amount equal to ninety-six one hundredths of one percent times the Member's monthly normal retirement benefit under Section 4.2 (computed without regard to this paragraph d) accrued as of November 17, 1982, commencing on the first anniversary of each such Member's actual retirement date after age sixty-five, with such amount

increasing non-cumulatively each year thereafter by an amount equal to an additional ninety-six one hundredths of one percent of the monthly benefit accrued as of November 17, 1982, provided, however, that any such Member shall not be entitled to a benefit under this subsection d if the proposed settlement as set forth in a settlement agreement pertaining to Anglim, et al v. Xerox Corporation, Civil Action No. B-83-251 (EBB) (the "Anglim action") is not consummated pursuant to such settlement agreement for any reason; provided, however, that the Plan Administrator may, in his discretion, elect to make one annual payment hereunder equal to the amount to be paid for the succeeding twelve months.

Section 4.3. Retirement Benefits for Members Who Retire on or after January 1, 1990. An eligible Member who retires on or after January 1, 1990 shall be entitled to a monthly normal retirement benefit of the largest of a or b or c, in each case plus d below, or e or f below.

a. One and four-tenths percent (1.4%) of Average Monthly Compensation of the Member multiplied by the number of full and fractional Years of Participation up to thirty less

(i) the vested accrued monthly benefit which would be payable as a Life Annuity under the XDS Retirement Income Plan assuming commencement of such benefit at the same time as the commencement of benefits under the Plan.

(ii) the vested accrued monthly benefit which would be payable as a Life Annuity from Company

contributions under Equitable Group Annuity Contract No. AC-158 assuming commencement of such benefits at the same time as the commencement of benefits under the Plan.

(iii) the vested accrued monthly benefit which would be payable as a Life Annuity under any TIAA-CREF Policy to which the Company or any of its predecessors made contributions assuming commencement of such benefit at the same time as the commencement of benefits under the Plan.

(iv) the vested accrued monthly benefit which would be payable as a Life Annuity under the ACTWU Plan assuming commencement of such benefit at the same time as the commencement of benefits under the Plan.

(v) the vested accrued monthly benefit which would be payable as a Life Annuity from the respective central pension funds maintained by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the International Printing and Graphics Communications Union, the Columbus Typographical Union and the Graphic Arts International Union and 50% of the vested accrued monthly benefit which would be payable as a Life Annuity from the central pension funds maintained by the International Union of Operating Engineers.

(vi) the Member's monthly normal retirement benefit under Section 11.9.

b. One percent of Average Monthly Compensation of the Member multiplied by the Member's full and fractional Years of Participation less the amounts specified in subsections a(i), a(ii), a(iii), a(iv), a(v),

and a(vi) of this Section 4.3.

c. The benefit which would have been payable at Normal Retirement Date accrued at the time of an earlier termination of employment of the Member, if any.

d. With respect to individuals who were both Employees and Members at any time between January 1, 1982 and November 17, 1982 (other than any such individual who on or before May 29, 1986 terminated employment with the Employer before completing ten Years of Service) and who, upon retirement, will be entitled to a normal retirement benefit under Section 4.3 of the Plan, an amount equal to ninety-six one hundredths of one percent times the Member's monthly normal retirement benefit under Section 4.2 of the Plan as in effect immediately prior to this 1989 Restatement of the Plan (computed without regard to this paragraph d) accrued as of November 17, 1982, commencing on the first anniversary of each such Member's actual retirement date after age sixty-five, with such amount increasing non-cumulatively each year thereafter by an amount equal to an additional ninety-six one hundredths of one percent of the monthly benefit accrued as of November 17, 1982, provided, however, that any such member shall not be entitled to a benefit under this subsection d if the proposed settlement as set forth in a settlement agreement pertaining to Anglim, et al v. Xerox Corporation, Civil Action No. B-83-251 (EBB) (the "Anglim action") is not consummated pursuant to such settlement agreement for any reason; provided, however, that the Plan Administrator may, in his discretion, elect to make one annual payment

hereunder equal to the amount to be paid for the succeeding twelve months.

e. The monthly benefit which could be purchased with a Member's Transitional Retirement Account, as calculated using annuity rates established by the PBGC.

f. The monthly benefit which could be purchased with a Member's Cash Balance Retirement Account, as calculated using annuity rates established by the PBGC.

. . .

ARTICLE 9

Other Provisions Affecting Benefits

. . .

Section 9.6. Nonduplication of Benefits. In the event any part of or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, if Section 8.8 does not apply to such distribution and such Member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

. . .

ARTICLE 10

Administration of the Plan

. . .

Section 10.2. Authority of Administrator. In the administration of the Plan the Administrator may, subject always to the requirements of Section 10.5,

a. Employ agents to carry out non-fiduciary responsibilities;

b. Employ agents to carry out fiduciary responsibilities (other than trustee responsibilities as defined in Section 405(c)(3) of ERISA);

c. Consult with counsel, who may be counsel to the Company;

d. Provide for the allocation of fiduciary responsibilities (other than trustee responsibilities as defined in Section 405(c)(3) of ERISA);

e. Construe the Plan and the Trust Agreement thereunder; and

f. Should any defect, omission or inconsistency in the Plan or the Trust Agreement be discovered at any time, the Administrator shall be empowered to take such action as may be necessary to correct such defect, rectify such omission or reconcile such inconsistency.

. . .

Section 10.5. Duties of the Administrator. The Administrator shall administer the Plan and adopt such rules and regulations as in the opinion of the Administrator are necessary or advisable to implement and administer the Plan and to transact its business. In performing her duties, the Administrator shall act solely in the interest of the Members of the Plan and their beneficiaries and

a. For the exclusive purpose of providing benefits to the members and their beneficiaries;

b. With a care, skill, prudence and diligence under the circumstances then prevailing that a

prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; and

c. In accordance with the documents and instruments governing the Plan insofar as such documents and instruments are consistent with the provisions of Title I of ERISA. In addition to any other duties the Administrator may have, the Administrator shall periodically review the performance of all persons to whom fiduciary duties have been delegated or allocated pursuant to the provisions of Section 10.2.

. . .

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL A. FROMMERT, et al., Plaintiffs, v. SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ AND LAWRENCE M. BECKER, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN ADMINISTRATORS and XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, Defendants.	00-CV-6311(L)

STATE OF NEW YORK)
COUNTY OF MONROE) SS.:

Lawrence M. Becker, being duly sworn, deposes and says:

1. I am the current Plan Administrator for the Xerox Retirement Income Guarantee Plan (the "Plan") and

am a named defendant in this action. I make this affidavit based upon personal knowledge, the terms of the Plan, and information provided by the Plan's actuaries. I also relied upon guidance from the United States Department of Treasury and the Internal Revenue Service, as well as the Second Circuit's opinion in this case, reported at *Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006).

2. I understand that under the Second Circuit's decision in *Frommert*, plaintiffs may be entitled to additional benefits under the terms of the Plan. As the party responsible for construing the terms of the Plan, I offer this interpretation of what plaintiffs are entitled to receive based on the Plan's terms and the dictates of the Second Circuit.

3. The issue before the Second Circuit was the manner in which rehired Xerox employees' previous benefit distributions are to be factored into the calculation of their retirement benefits. *Frommert*, 433 F.3d at 257. The Second Circuit recognized that "to avoid paying duplicative benefits to rehired employees who had previously received a lump sum distribution, the Plan has always contained provisions concerning the offset of prior distributions," and that "without such provisions, rehired employees would receive a windfall upon their second departure from Xerox because they would receive benefits based on their initial tenure at the company on two separate occasions." *Id.*

4. The Second Circuit concluded that the offset referred to in the 1989 Restatement could not be read to encompass the use of a "phantom account." *Id.* at 262.

5. Under the "phantom account" approach, an employee's prior distribution was brought forward based on the hypothetical investment gains or losses it would have experienced had the distributed funds remained in the Plan until the employee began receiving benefits a second time. Since there are two balances that are considered in determining a participant's benefit under the Plan, there are actually two "phantom accounts" for an employee who has taken a prior distribution: cash balance retirement account ("CBRA") and the Transitional Retirement Account ("TRA"). Interest credits at the Plan's cash balance interest crediting rates were added to the employee's CBRA phantom account beginning January 1, 1990, and the hypothetical investment gains or losses, equal to the actual investment gains or losses was credited to the employee's TRA phantom account. The resulting account balances (including the respective phantom accounts) were then each converted to annuities and compared with the annuity benefit under the highest average pay ("HAP") formula (*i.e.*, the normal retirement annuity described in section 4.2(a), (b), and (c) of the Plan, which is based on the employee's pay and service). The annuity based upon the appropriate phantom account balance was then subtracted from the greatest of the annuity benefits produced by the three formulas (the TRA, the CBRA, and the HAP) to calculate the employee's ultimate benefit. *Id.* at 260.

6. Although the Second Circuit rejected the use of the phantom account method of performing the offset under the 1989 Restatement, it did not find that the offset was invalid in its entirety. *See generally*

Frommert, 433 F.3d at 254-272. The question the Second Circuit left open is how plaintiffs' prior benefit distributions should be offset, or otherwise taken into account, without using the phantom account offset approach.

7. After reviewing relevant plan provisions in light of the Second Circuit's decision, I have determined that the appropriate formula to use in recalculating plaintiffs' benefits is one that employs an offset to the HAP formula, and that would entitle each plaintiff to a minimum benefit that, when expressed in the form of a single life annuity beginning at normal retirement age, is equal to the greatest of:

(a) the participant's TRA, determined without regard to the participant's prior distribution (*i.e.* excludes any amounts associated with the prior distribution) and expressed as an annuity commencing at normal retirement age;

(b) the participant's CBRA, determined without regard to the participant's prior distribution (*i.e.*, excludes any amounts associated with the prior distribution) and expressed as an annuity commencing at normal retirement age; and

(c) the participant's HAP formula, taking into account the participant's service prior to rehire and offset by the participant's prior distribution expressed as an annuity commencing at normal retirement age.

I explain the basis of this approach in greater detail below.

8. As stated above, the Second Circuit ruled out use

of a phantom account methodology under the 1989 Restatement of the Plan, but it did not rule out taking a rehired employee's prior benefit distribution into account altogether. To the contrary, the Court noted that a windfall would result if prior benefit distributions were not taken into account in some fashion.

9. The Department of Treasury and IRS have explained in regulations[1] governing tax-qualified retirement plans precisely how a floor-offset plan, such as the Xerox Plan, may take a prior distribution into account. Under the regulations' approach, the "accrued benefit" in the defined benefit plan is offset by the "actuarial equivalent" of the prior distribution from the defined contribution plan. 26 C.F.R. § 1.401(a)(4)-8(d)(1)(i). It is this approach that I have concluded is reasonable to use here.

10. For purposes of the Treasury and IRS guidance, an employee's "accrued benefit" is "expressed in the form of an annual benefit commencing at normal retirement age." *Id.* (referencing 26 U.S.C. § 411(a)(7)(A)(i)). Consistent with this statute, the HAP benefit is expressed as a "monthly normal retirement benefit," meaning a single life annuity beginning, in most cases, at age 65. (1989 Restatement § 4.3.) Thus, to apply the methodology

---

[1] These regulations set forth a safe harbor under which a tax-qualified, floor-offset pension plan may satisfy the prohibition against discriminating in favor of highly compensated employees under section 401(a)(4) of the Internal Revenue Code of 1986, as amended. 26 U.S.C. § 401(a)(4).

adopted by the Treasury and IRS in the regulation specified above, the HAP benefit must be offset by the "actuarial equivalent" of the lump sum benefit distribution that plaintiffs previously received.

11. The purpose of offsetting the accrued benefit by the "actuarial equivalent" of the prior lump sum distribution is to permit a comparison of benefits *expressed in the same form* -- that is, to permit an "apples to apples" comparison. Because the HAP benefit is expressed as a single life annuity beginning at normal retirement age, the prior benefit distribution must be converted to an "actuarially equivalent" annuity beginning at normal retirement age. Without such a conversion, no valid comparison between the HAP benefit and the prior distribution would be possible, because different forms of benefits simply cannot be added together or subtracted from one another. It would simply not be possible, for example, to subtract a prior distribution of $50,000 from an annuity that provides $2,000 per month from retirement age until a plan participant dies; the benefits must be in the same form to do that.

12. "Actuarial equivalence" simply means converting one form of benefit into another that has the same value. 26 C.F.R. § 1.401(a)(4)-12 (definitions of "actuarial equivalence" and "actuarial present value"). The calculation of actuarial equivalence involves interest rate assumptions as well as mortality assumptions (*i.e.*, assumptions about when a participant will die). *Id.*

13. I have decided to apply both the interest rate identified under 26 U.S.C. § 417(e) and the Plan's mortality table as in effect at the time of plaintiffs' prior distributions. The § 417(e) interest rate is the

required rate that is allowable by the Employee Income Retirement Security Act ("ERISA") and the Internal Revenue Code to be used to calculate the minimum amount of a lump sum distribution of a retirement annuity. I will refer to these assumptions as the "Statutory Assumptions."

14. Prior to 2000, the Statutory Assumptions for the Plan were the Valuation Rates used to calculate lump sums established by the Pension Benefit Guaranty Corporation ("PBGC"). *Id.* The Pension Guaranty Corporation is the agency responsible for insuring defined benefit pension plans, such as the Xerox Plan. From 1987 until 2000, the PBGC rates used under the statute to value lump sums were 100% of the PBGC immediate and deferred rates if the amount was no greater than $25,000 and 120% of the PBGC immediate and deferred rates for greater amounts. Prior to 1987, only PBGC immediate rates were used. While the statutory provision specifying assumptions for lump sum determinations became effective in 1985, I find it reasonable to use the same interest rate (that is, the PBGC immediate rate) for the period prior to 1985, as no statute provided any other assumption.

15. In my judgment, applying the Statutory Assumptions in effect at the time of plaintiffs' prior distributions is consistent with the 1989 Restatement of the Plan, which uses the Statutory Assumptions in effect at the time of TRA and CBRA distributions to convert the TRA and CBRA accounts to annuities. (1989 Restatement § 4.3(e), (f)). These assumptions are further reasonable because these are the same assumptions the statute applies to convert an annuity into a lump sum, which is merely

the mirror-image of what is done here (*i.e.*, converting a lump sum into an annuity), and because the interest used under this approach is the one established by the PBGC based on a survey of annuity purchase rates in commercial markets. In addition, I understand this is similar to the approach was taken by a United States court of appeals. *See Hickerson v. Velsicol Chemical Corp.*, 778 F.2d 365, 379 (7th Cir. 1985).

16.To further ensure the equitable nature of the methodology, I have determined that an overall interest rate cap would be appropriate. I have determined that the appropriate cap may be found in the regulation referred to above, which explains the assumptions to be used when converting a prior distribution into an actuarially equivalent normal retirement annuity:

In determining the actuarial equivalent of amounts provided under the defined contribution plan, an interest rate no higher than the highest standard interest rate must be used, and no mortality may be assumed in determining the actuarial equivalent of any prior distributions from the defined contribution plan or for periods prior to the benefit commencement date under the defined benefit plan.

26 C.F.R. § 1.401(a)(4)-8(d)(1)(i). The regulation therefore specifies the maximum interest rate that may be used (*i.e.*, the "highest standard interest rate"), and further specifies that a pensions plan cannot assume that the participant will die during the period prior to retirement (*i.e.*, "no mortality may be assumed . . . for period prior to [retirement age]"). The highest "Standard interest rate" in 8.5 percent, compounded annually. 26 C.F.R. § 1.401(a)(4)-12.

17. With respect to plaintiffs hired before 1998, I have elected to apply the approach described in the regulations because the Department of Treasury and IRS have determined that this approach is reasonable, and because this approach is consistent with the 1989 Restatement of the Plan which (1) provides for an offset for prior distributions, *see Frommert*, 433 F.3d at 257; 1989 Restatement § 9.6, and (2) expresses the HAP benefit as an annuity beginning at normal retirement age. *See* 1989 Restatement § 4.3.

18. Once the prior distribution is expressed as an age 65 retirement annuity, it is subtracted from the annuity produced under the HAP formula. The resulting HAP annuity is then compared to the annuities provided by the CBRA and TRA accounts. If the TRA produces the greatest benefit, the employee receives only the balance in the TRA account. If either of the defined benefit formulas (HAP or CBRA) produces the greatest benefit, the employee receives the balance in the TRA account plus the amount of defined benefit that is needed to bring the total benefit up to the level of the winning formula. If the HAP formula produces the greatest benefit, and the employee receives a distribution prior to normal retirement age or in a form other than a single life annuity commencing at normal retirement age, the HAP benefit (after subtracting the annuity equivalent of the prior distribution) is converted to an earlier benefit and/or a different form of benefit based on the assumptions specified in the Plan.

19. This approach differs from the "phantom account" approach. Most importantly, the employee's prior

distribution is not brought forward with hypothetical earnings and then converted to an annuity. Instead, the actual prior distribution is converted to an age 65 annuity *as of the time of the prior distribution*. The amount of the offset therefore does not depend on events that occur after the distribution is made, such as changes in interest rates or other investment experience. Rather, the offset is fixed at the time of the prior distribution.

20. This approach also avoids any subjective decisions on what the future might hold as these rates are reflective of the then current annuity market. In addition, this procedure is consistent with the calculation that was actually prepared when the participant's initial distribution was determined, so it is not a new concept for the Plan.

21. Second, the TRA and CBRA benefits are compared to the HAP benefit *without* adding back (and later subtracting) the prior distribution. This approach therefore avoids "skewing" the comparison of the three formulas in a manner that the Second Circuit found to result from the "phantom account" approach. *See Frommert*, 433 F.3d at 268 ("By including a large amount of hypothetical growth in a nonexistent account, the comparison among the three accounts is skewed in favor of selecting either the TRA or CBRA over the [HAP benefit] as the basis for payment.").

22. The approach described above is applied only with respect to benefits accrued prior to the distribution of a summary plan description ("SPD") for the Plan in September 1998. The "phantom account" approach applies beginning 15 days after the distribution of the SPD. The approach is taken because I

understand that the Second Circuit's decision applies to plaintiffs hired before 1998 only with respect to the benefits accrued before receipt of notice under § 204(h) of ERISA. The phantom account may accordingly be applied to the accrued benefit determined after such notice is provided.

23. My determination is based upon the fact that both the 1998 SPD and the May 1997 letter sent by the Plan Administrator to rehires describe in detail the effect of the phantom offset, and both state that the phantom offset is effective "for all future benefits payable" under the Plan. I have determined that for purposes of starting the 15 day notification period required by § 204(h), the 1998 SPD is the more appropriate of the two 204(h) notices.

24. Because the phantom account approach applies after September 1998, an employee will be entitled to a benefit equal to the greater of (a) the benefit determined in accordance with the approach set forth in this affidavit based on service and pay through September 1998, and (b) the benefit determined under the "phantom account" approach based on all years of service and all pay, as described in the Plan after September 1998.

/s/
Lawrence M. Becker

Sworn to before me this
[26th] day of June, 2006

/s/ Margaret A. Clemens
Notary Public

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL J. FROMMERT, et al.,	X	00-CV-6311(L)
Plaintiffs,	)	
vs.	)	Rochester, New York
	)	July 11, 2006
SALLY L. CONKRIGHT, et al.,	)	9:30 a.m.
Defendants.	)	
	X	

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE DAVID G. LARIMER UNITED STATES DISTRICT JUDGE

ROBERT H. JAFFE & ASSOCIATES, P.A.
BY: ROBERT H. JAFFE, ESQ.
8 Mountain Avenue
Springfield, New Jersey 07081

-and-

SCHELL & SCHELL, P.C.
BY: GEORGE A. SCHELL, ESQ.
410 Perinton Hills Office Park
Fairport, New York 14450
Appearing on behalf of the Plaintiffs

NIXON PEABODY, LLC
BY: MARGARET A. CLEMENS, ESQ.
Clinton Square, P.O. Box 31051
Rochester, New York 14603
Appearing on behalf of the Defendants

COURT REPORTER:

Christi A. Macri, FAPR, RMR, CRR, CRI
Kenneth B. Keating Federal Building
100 State Street
Rochester, New York 14614-0222

. . .

CROSS-EXAMINATION

BY MS. CLEMENS:

Q. Mr. [Philip] Cofield, you said you were an enrolled actuary; is that correct?

A. That's correct.

Q. And actuaries are subject to meeting certain standards in the profession as an enrolled actuary; is that correct?

A. That's correct.

Q. And you're required to comply with basic actuarial standards set by the different actuarial standards boards; isn't that correct?

A. Yes.

Q. And you're familiar with the concept of actuarial equivalents, are you not?

A. Yes, I am.

. . .

Q. Now, in the course of your practice when you determine formula benefits and you have to convert one formula benefit into another, wouldn't you use actuarial equivalence then?

A. Yes.

Q. And you would take into account the time value of money, would you not?

A. Yes.

Q. And when you're looking at things like optional forms of payment, wouldn't you use actuarial equivalence at that point in time?

A. Yes, usually.

Q. And in taking into account the time value of money?

A. Yes.

Q. And if the plaintiffs, such as Mr. Clair who testified this morning, in fact, got money in 1985; there is some time value of that money that he got that's worth more today than it was worth in 1985; is that correct?

A. Yes.

Q. Now, one of the things that you said is that the SPD -- in your reading in this case of the 1989 SPD was that it led to -- I think your words were the Jaffe approach; is that right?

A. Those weren't my words.

Q. The Layaou approach?

A. Yes.

Q. That you would offset for at least the amount of the prior distribution lump sum value?

A. Yes.

Q. And one of the things that I think you said on your direct exam, one of the things wrong with that is there was some intrinsic time value of money that was omitted from that concept; is that right?

A. Yes, that's correct.

Q. So in fairness, to account for that, you would have to do some actuarial equivalence of that lump sum to account for its value to Mr. Clair today?

A. Yes.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JAN 2 8 2009
OFFICE OF THE CLERK

No. 08-810

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, CROSS-PETITIONERS,

v.

PAUL J. FROMMERT, ET AL., RESPONDENTS
AND
KENNETH PIETROWSKI, ET AL., CROSS-RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF SIXTY-TWO [62] RESPONDENTS & SEVEN [7] CROSS-RESPONDENTS

SHAUN P. MARTIN
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
5998 Alcalá Park
San Diego, CA 92110
(619) 260-2347

BRENDAN S. MAHER
Counsel of Record
PETER K. STRIS
STRIS & MAHER LLP
1920 Abrams Pkwy., #430
Dallas, TX 75214
(214) 224-0091

Counsel for 62 Respondents and 7 Cross-Respondents

JANUARY 2009

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Second Circuit (in 2008), as Cross-Petitioners suggest, mistakenly interpreted its prior decision in this case (issued in 2006) and, as such, applied a correct—but, according to Cross-Petitioners, circumstantially inapplicable—standard in reviewing the factual findings of the district court on remand.

PARTIES TO THE PROCEEDING

All Cross-Petitioners are listed on the caption.

The Sixty-Two [62] Respondents are Paul Frommert, Mary Beth Allen, Napoleon Barbosa, Thomas Barnes, Michael Benson, Linda Bourque, Robert Brackhahn, Ronald Campbell, Robert Carrando, Joyce Cathcart, William Cheslock, Alan Clair, Bonnie Cohen, Frank Commesso, William Craven, Thomas Dalton, Frank Darling, Paul Defina, Janis Edelman, James Farrell, Don Foote, Brian Gaita, Lawrence Gallagher, Richard Glikin, Gary Hardin, Alexandra Harrick, Colt Hitchcock, Michael Horrocks, Kathleen Hunter, Patricia H. Johnston, Patricia M. Johnson, Vincent Johnson, Molly Kehoe, Ronnie Kolniak, William Ladue, Maureen Laughlin-Jones, Kathleen Levea, Claudette Long, Brenda Mcconnell, Thomas Mcgee, Julie Mcmillan, Ruby Jean Murphy, Gail Nasman, Kenneth Parnett, Dale Platteter, William Plummer, Joyce Pruett, Anatoli Puschkin, Nancy Revella, David Rohan, Ben Roth, Carmen Sofia, Richard Spring, Floyd Swaim, Kathy Thompson, Francis Pat Tobin, Thomas Vasta, James Walls, Candy White, Chuck Willette, David Young, and Charles Zabinski.

The Seven [7] Cross-Respondents are Kenneth W. Pietrowski, William M. Burritt, William F. Coons, Deborah J. Davis, Charles Hobbs, Charles J. Maddalozzo, and John A. Williams.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... (i)
PARTIES TO THE PROCEEDING ..... (ii)
TABLE OF CONTENTS ..... (iii)
TABLE OF AUTHORITIES ..... (iv)
INTRODUCTION ..... (1)
STATEMENT 3
REASONS FOR DENYING THE WRIT 7
I. NEITHER OF THE TWO QUESTIONS PRESENTED IN THE CROSS-PETITION WAS RAISED OR DECIDED BELOW 7
A. The First Question Is Not Presented 8
B. The Second Question Is Not Presented 10
C. Cross-Petitioners Are Not Credible 12
II. THE ACTUAL QUESTION PRESENTED IS NOT WORTHY OF FURTHER REVIEW 14
III. EVEN IF THE QUESTIONS IN THE CROSS-PETITION WERE PRESENTED, PLENARY REVIEW IS UNWARRANTED 15
CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases:

American Constr. Co v. Jacksonville, T. & K.W. Ry., 148 U.S. 372 (1893) 16

Cook v. Liberty Life Ass. Co. of Boston, 320 F.3d 11 (CA1 2003) 10, 11

Curtis-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 13

Eddy v. Prudence Bonds Corp., 165 F.2d 157 (CA2 1947) 12

Emor, Inc. v. Cyprus Mines Corp., 467 F.2d 770 (CA3 1972) 12

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 13, 14

Frommert v. Conkright, 433 F.3d 254 (CA2 2006) ..... passim

Grosz-Salomon v. Paul Revere Life Ins. Co., 237 F.3d 1154 (CA9 2001) 9, 10

Mobil Oil Corp. v. FRP, 417 U.S. 283 (1974) 15

Nichols v. Prudential Ins. Co. of Am., 406 F.3d 98 (CA2 2005) 14

NLRB v. Hobart Bros. Co., 372 F.2d 203 (CA6 1967) 12

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 15

Welsh v. Burlington Northern, Inc. Employee Benefits Plan, 54 F.3d 1331 (CA8 1995) 12

Zervos v. Verizon New York Inc., 277 F.3d 635 (CA2 2002) 10

INTRODUCTION

This litigation, which now enters its 10th year, involves over 100 plaintiffs—each of whom is an employee or former employee of the Xerox Corporation. Although the facts and procedural history of the case are extraordinarily complex, the reason to deny the petition filed by Sally L. Conkright *et al.* (hereinafter, the "Xerox Cross-Petition" or "Cross-Petition") is quite simple: the challenged ruling creates no conflict and poses no question worthy of review by this Court.[1]

---

[1] The Cross-Petition addresses one of the issues resolved below: whether the district court selected an appropriate methodology for calculation of the plaintiffs' benefit entitlement. Pet. App. 7a-14a (Section I, captioned "Remedy"). ["Pet. App. __" is used herein to refer to pages of the appendix filed by Cross-Petitioners.] In its opinion, the court of appeals resolved a second issue: whether the claims of a subset of plaintiffs in this litigation were extinguished when they signed boilerplate releases as part of a workforce reduction that was unrelated to this litigation (hereinafter, the "Release Issue"). Pet. App 14a-21a (Section II).

The Release Issue, on which the Xerox Cross-Petitioners prevailed below, has no bearing on the claims of the sixty-two [62] respondents (hereinafter, the "Frommert Respondents"). It is, however, the subject of a pending petition for a writ of certiorari filed by the seven [7] cross-respondents (hereinafter, the "Pietrowski Cross-Respondents"). *See* Docket # 08-826.

The Release Issue is also the subject of a pending petition for a writ of certiorari filed by Robert H. Jaffe, Esq. *See* Docket # 08-803 (hereinafter, the "Jaffe Petition"). Although the caption of the Jaffe Petition appears to suggest that it is filed on behalf of all plaintiffs in this litigation, the Frommert Respondents and the Pietrowski Cross-Respondents are not represented by Mr. Jaffe. Insofar as the Jaffe Petition purports to be filed on their behalf, it was certainly not done so with their authorization.

Cross Petitioners are undoubtedly aware that a fact-bound and case-specific holding does not satisfy the criteria for *certiorari*. To sidestep that problem, they manufacture two broad legal questions regarding the proper standard of judicial review in ERISA cases. As explained *infra*, however, neither question presented in the Cross-Petition was raised or decided below.

The true grievance of Cross-Petitioners is this: they allege that the Second Circuit misconstrued its own prior opinion in this litigation, *Frommert v. Conkright*, 433 F.3d 254 (CA2 2006). As a result—according to Cross-Petitioners—the Second Circuit applied the wrong standard in reviewing the decision of the district court on remand. The essence of this argument is *not* that the Second Circuit broke with this Court and other circuits by applying a *new* standard of review. To the contrary, the actual claim of Cross-Petitioners is that the Second Circuit *misinterpreted the particular facts and circumstances of this case* and, because of that, applied the *wrong* legal standard. Even if true—and it is not—such error does not warrant further review.

Plenary review would be unwarranted even if the two questions in the Cross-Petition were fairly presented. As explained herein: (i) it is far from clear that the questions presented were outcome determinative; (ii) review is sought of an interlocutory order, rather than a final judgment; (iii) the alleged circuit split is—at best—uncertain, undeveloped, and capable of resolution without this Court's intervention, and (iv) the court of appeals explicitly held that Cross-Petitioners waived a key part of their argument.

The Cross-Petition should be denied.

STATEMENT

1. This litigation has endured for 10 years. It involves over 100 plaintiffs. And it has given rise to two written opinions by the court of appeals—one in 2006, Pet. App. 22a-60a (*Frommert I*) and another in 2008, Pet. App. 1a-21a (*Frommert II*). In light of its factual and procedural complexity, some background is necessary in order meaningfully address the contentions in the Xerox Cross-Petition.

2. At no point during the course of this litigation, have any of the following facts ever been in dispute:

- Each of the 100+ plaintiffs in this litigation worked for Xerox and "left the company at one time or another." Pet. App. 25a, 63a.
- When each plaintiff left the company, (s)he "received lump-sum distributions of [his/her earned] retirement benefits." *Id.*
- Each plaintiff was then rehired by Xerox at some point thereafter. *Id.*
- Upon rehire, each plaintiff began to accrue additional pension benefits under the Xerox Corporation Retirement Income Guarantee Plan (the "Xerox Plan"). *Id.*
- The Xerox Plan requires that benefits accrued by plaintiffs (for services rendered after rehire) be reduced (*i.e.*, "offset") by some amount to account for the lump sum payment each already received. *Id.* at 26.

The central dispute in this case is over "whether the [Xerox Plan] administrators properly offset plaintiffs' lump-sum distributions [ ] against the retirement bene-

fits accruing as a result of the employees being rehired." Pet. App. 63a.

3. Prior to the initiation of any litigation, Cross-Petitioners took the position that

> [t]he offset is calculated by the value of the prior lump-sum distribution plus any sum that the distribution would have earned (hypothetically) had it remained in the fund and been invested. The parties refer to this as the 'phantom account' offset.

Id. (hereinafter, the "Phantom Account Offset"). *See also* Pet. App. 74a (quoting pre-litigation memo from Xerox); Pet. App. 35a (same). In 1999, affected Xerox employees or former employees filed suit challenging Cross-Petitioners' application of the Phantom Account Offset to them. *Id.* at 35a, 62a.

4. Before the district court, the parties agreed that "at least by 1998, and continually since then, the [Xerox] Plan has expressly provided for the phantom account offset." Pet. App. 81a. The parties disagreed, however, over whether the relevant provisions in Xerox Plan documents *prior to 1998* could properly be interpreted as employing a phantom account offset.

Cross-Petitioners took the position that, *prior to 1998*, the relevant Xerox Plans and summary plan descriptions ("SPDs")—through the inclusion of many detailed provisions—provided for a phantom account offset. This position of Cross-Petitioners will hereinafter be referred to as the "Pre-1998 Phantom Account Interpretation." *See, e.g.*, Pet. App. 64a-71a (discussing, at length, many relevant provisions); Pet. App. 83a (noting that "the 1983 Restatement [ ] set forth a phan-

tom account provision virtually identical to the ones challenged in the case at bar") (citation omitted).

In a ruling that preceded *Frommert I*, the district court agreed with Cross-Petitioners regarding their Pre-1998 Phantom Account Interpretation. Pet. App. 85a ("Given the history of the Plan, I do not believe that the administrator's consistent application of the phantom account offset can be said to be arbitrary and capricious."). The central issue was clearly stated by the district court judge as follows:

> [t]he point, however, is that the Plan had consistently, and in my view not unreasonably, been interpreted by the administrator as providing for a phantom account offset for prior distributions * * * *

Pet. App. 87a. As such, the district court granted summary judgment to the Xerox Cross-Petitioners. Pet. App. 98a. All plaintiffs appealed. Pet. App. 24a.

5. Before the Second Circuit (*i.e.*, in *Frommert I*), the Xerox Cross-Petitioners continued to defend their Pre-1998 Phantom Account Interpretation. In the words of the Second Circuit:

> [t]he defendants contend, and the district court agreed, that the phantom account has *always* been part of the Plan * * * * Specifically, the defendants contend that the phantom account was present in versions of the Plan prior to the 1989 Restatement and that its omission from the 1989 Restatement was rectified by [ ] subsequent disclosures.

Pet. App. 42a (emphasis added).

The court of appeals, however, disagreed and found "as a matter of law, that the phantom account was not

part of the Plan until 1998 when it was added by amendment of the Plan's text through its explanation in the 1998 SPD." *Id.* As the court firmly noted:

> [i]t is clear, *under either an arbitrary or capricious standard or as a matter of law*, that the Plan administrator's conclusion that the Plan *always* included the phantom account is unreasonable.

Pet. App. 44a (emphasis added, footnote omitted). As such, the Second Circuit vacated the judgment dismissing the action, *id.* at 60a, and remanded the case to the district court to "determine[e] the appropriate calculation and fashion[ ] the appropriate remedy." *Id.* at 51a.

6. On remand, the district court "conducted a two-day hearing on the remedial issues raised by the Second Circuit and [ ] received both pre-hearing and post-hearing memoranda from both sides." Pet. App. 102a. After considering the evidence presented, the district court turned its attention to some of the very plan provisions "noted by the Court of Appeals" in *Frommert I*. Pet. App. 105a-106a (discussing sections 1.1, 4.3, and 9.6 of the Xerox Plan as well as the SPDs). Ultimately, the district court determined that the proper pre-1998 offset was the lump-sum payment itself without any appreciation adjustment. *Id.* at 106a-108a. The Xerox Cross-Petitioners appealed.

7. In *Frommert II*, the Second Circuit sought to resolve the offset issue in the wake of the plan administrator's unreasonable interpretation of the pre-1998 Plan and SPDs. *See* Pet. App. 45a n.11 ("*Frommert I*") (holding that the administrator's interpretation was "unreasonable under either [a *de novo* or deferential] standard."). The court of appeals concluded that the

offset methodology selected by the district court was a reasonable remedy for the "identified ERISA violation" committed by Cross-Petitioners. Pet. App. 8a. As such it affirmed the district court's ruling.

8. The Xerox Cross-Petitioners sought rehearing and/or rehearing *en banc*. On September 25, 2008, the Second Circuit denied that request. Pet. App. 129a-131a. The Cross-Petition followed.

REASONS FOR DENYING THE WRIT

I. NEITHER OF THE TWO QUESTIONS PRESENTED IN THE CROSS-PETITION WAS RAISED OR DECIDED BELOW

According to Cross-Petitioners, the Second Circuit's opinion contains the following two holdings:

> First, the Second Circuit held that the well established rule that courts must defer to a plan administrator's reasonable interpretation of an ERISA plan does not apply when the plan administrator interprets the plan outside the context of an administrative claim for benefits.
>
> * * *
>
> Second, the Second Circuit held that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of a pension plan if the interpretation is rendered in the course of determining the additional benefits due to a plan participant as a result of a violation of law.

Pet. 2. As explained below, neither of these two alleged holdings can be found in the lower court's opinion.

A. The First Question Is Not Presented

Nowhere does the court of appeal's opinion articulate, or rely upon, a distinction between determinations made by an ERISA plan administrator inside versus "outside the context of an administrative claim for benefits." Pet. 2, 12. Relying on the phrase "mere *opinion* of the plan administrator," *id.* at 14, the Xerox Cross-Petitioners read this distinction into the Second Circuit opinion. But Cross-Petitioners cite the quoted phrase entirely out of context. The full sentence in the court of appeal's opinion reads as follows:

> Defendants-Appellants [*i.e.*, the Xerox Cross-Petitioners] have identified no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, **where the administrator had previously construed the same terms and we found such a construction to have violated ERISA.**

Pet. App. 13a (italics in original, bold emphasis added).

The Second Circuit did not refer to the plan administrator's interpretation of the plan as a "mere *opinion*" because—as Cross-Petitioners suggest—it was rendered "outside of the context of an administrative claim for benefits." Pet. 14. Rather, the court of appeals considered it a "mere *opinion*" because the administrator's previous interpretation of "the same terms" in the plan had already been rejected in *Frommert I*. *See* Pet. App. 44a-45a (rejecting the Pre-1998 Phantom Account

Interpretation as unreasonable under either a *de novo* or deferential standard.").[2]

As the court of appeals noted, Cross-Petitioners could not "identify[y any] authority in support of the proposition that a district court must afford deference to [such an] *opinion.*" Pet. App. 13a. This is hardly surprising because deference to such an opinion (*i.e.,* the *secondary* interpretation of plan terms already wrongfully interpreted by an administrator) would permit administrators to give a ranked list of their preferred litigation positions; a federal court would then be required to go down the list and choose the highest-ranked interpretation that was reasonable. This, of course, is not the law in any circuit. *See, e.g., Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (CA9 2001) ("[A] plan administrator will not get a

---

[2] Buried in a footnote, the Xerox Cross-Petition asserts that "[i]t is not the case that the District Court and the Plan Administrator construed on remand the same Plan terms that the Second Circuit found to have violated ERISA." Pet. 14. Amazingly, the Cross-Petition fails to mention that the court of appeals *expressly* took the opposite position on this critical factual matter.

In any event, Xerox is simply wrong. One issue in *Frommert I* was whether the pre-1998 plan documents standing alone had provided for a phantom account offset. Xerox's Plan Administrator interpreted the pre-1998 plan documents to have required phantom accounting; plaintiffs disagreed. *Frommert I* held that while the post-1998 plan documents provided for a phantom account (because of a clear 1998 SPD); the pre-1998 documents taken in their entirety did not, *under any standard*, provide for phantom accounting. It also held that the post-1998 terms could not retroactively apply to the pre-1998 plan documents because of ERISA's anti-cutback provision. The issue on remand was the appropriate remedy for pre-1998 rehires. There was no "different" set of pre-1998 plan terms/documents for the plan administrator to interpret.

second bite at the apple when its first decision was simply contrary to the facts.").[3]

B. The Second Question Is Not Presented

It is black-letter law that "[a]n appellate court reviews a district court's choice of remedy for an ERISA violation for abuse of discretion." *Cook v. Liberty Life Ass. Co. of Boston*, 320 F.3d 11, 24 (CA1 2003) (citing *Zervos v. Verizon New York Inc.*, 277 F.3d 635 (CA2 2002); *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (CA9 2001).

This is precisely how the Second Circuit characterized the relevant issue before it. Pet. App. 7a ("On appeal, [Cross-Petitioners] challenge the District Court's remedy for the ERISA violations we identified in our prior decision, *i.e.*, the impermissible amendment of the ERISA plan at issue to calculate Plaintiffs-Appellees' pension benefits according to a 'phantom account' offset method."). *See also* Pet. App. 8a (where the Second Circuit noted that "[w]e review a district court's chosen remedy of an identified ERISA violation for an excess of allowable discretion." (citation omitted).

---

[3] Similarly, Cross-Petitioners' reliance on the phrase "the District Court 'had no decision to review because the plan administrator never rendered any decision other than the original benefit determinations'" is taken out of context. Pet. 11 (citing Pet. App. 13a). The quotation in the Cross-Petition eliminates the critical ending of the court's sentence which reads "all of which were premised on the now-impermissible 'phantom account' offset mechanism." *Id.* In other words, the court was merely clarifying that once an ERISA plan administrator's original interpretation of plan language is rejected, any "secondary" interpretation advanced by the administrator is no longer an exercise of discretion entitled to judicial deference. *It is merely a litigation position.*

The courts of appeals—including the Second Circuit—are in unanimous agreement such "remedial" decisions include whether, and what, ERISA benefits to award once benefits have been improperly denied by a plan administrator. In such circumstances—like those of this case—the district court is permitted to—but need not—consider further input from the administrator. In the words of the First Circuit:

> We have no doubt that in some situations a district court, after finding a mistake in the denial of benefits, could conclude that the question of entitlement to benefits for a past period should be subject to further proceedings before the ERISA plan administrator [, h]owever, the variety of situations is so great as to justify considerable discretion on the part of the district court.

Cook, 320 F.3d at 24. As the First Circuit went on to explain, the basis for this well-settled principle is simple: "ERISA deference does not deprive a court of its discretion to formulate a necessary remedy when it determines that the plan has acted inappropriately." *Id.*

To sidestep this fact, Cross-Petitioners manufacture a question (the second question presented in the Cross-Petition) regarding whether "a district court has 'allowable discretion' to adopt any 'reasonable' interpretation of the terms of a pension plan if the interpretation is rendered in the course of determining the additional benefits due to a plan participant as a result of a violation of law." Pet. i.

Other than its use of the words "allowable discretion" and "reasonable," however, Cross-Petitioners' articulation of this question finds no support in the text of

the Second Circuit opinion. Nor can it be found in *any* of the cases cited in the Cross-Petition. For example: in asserting that the Second Circuit "creates a circuit conflict," Pet. 29, Cross-Petitioners cite six cases from various courts of appeals in the body of their argument. But of these six cases, five have nothing to do with ERISA. In fact, three of these cases were decided before ERISA even existed. *See Eddy v. Prudence Bonds Corp.*, 165 F.2d 157 (CA2 1947);[4] *Emor, Inc. v. Cyprus Mines Corp.*, 467 F.2d 770 (CA3 1972); *NLRB v. Hobart Bros. Co.*, 372 F.2d 203 (CA6 1967).[5]

C. Cross-Petitioners Are Not Credible

It bears mention that the two questions presented in the Xerox Cross-Petition are merely the latest of at least *five* certworthy issues that Cross-Petitioners claim have arisen in this case. This Rorschach approach employed by Cross-Petitioners is not credible.

For example, in seeking rehearing *en banc* of *Frommert I*, Cross-Petitioners claimed that:

> The panel decision that the manner in which appellees instituted a 'phantom account' offset, as contained in Xerox Corporation's Retirement Income Guarantee Plan [ ] violated the

---

[4] Cross Petitioners' citation of this particular case is curious. Cross Petitioners seem to be suggesting that the Second Circuit panel has overruled itself *sub rosa*—at least in the ERISA context.

[5] The only ERISA case relied on by Cross-Petitioners, *Welsh v. Burlington Northern, Inc. Employee Benefits Plan*, 54 F.3d 1331, 1340 (CA8 1995), does not even stand for the proposition for which it is cited. The *Welsh* court *affirmed* the district court's interpretation and, in so doing, did *not* employ *de novo* review.

> Employee Income Retirement Security Act [ ] involves a matter of exceptional importance in that it conflicts with an authoritative decision of [the] United States Court of Appeals [for the Ninth Circuit].[6]
>
> * * *
>
> *En banc* consideration is also warranted [because t]he definition the panel established [of amendment] conflicts with [ ] *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).[7]
>
> *En banc* consideration is further justified on the issue as to the proper standard for recovery for an inadequate summary plan description [because the Second Circuit] standard conflicts with the standard set by authoritative decisions of other circuit courts of appeal.[8]

Cross-Petitioners' Request for Rehearing and/or Rehearing *En Banc*, 2006 WL 2362272.

---

[6] Cross-Petitioners filed a petition for a writ of certiorari in the Ninth Circuit case of Xerox Corporation Retirement Income Guarantee Plan v. Miller in January of 2007. *See* http://www.scotusblog.com/movabletype/archives/06-962.pdf. This Court denied the petition. *See* Docket 06-962.

[7] In their current effort, Cross-Petitioners have replaced their claim that the Second Circuit has ignored *Schoonejongen* with the claim that the Second Circuit has now ignored *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) and *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343 (2008). Pet. 17-22.

[8] Reference to this alleged circuit split is conspicuously absent from the Xerox Cross-Petition.

II. THE ACTUAL QUESTION PRESENTED IS NOT WORTHY OF FURTHER REVIEW

As explained above, this case does not involve a dispute over what standard of judicial deference should apply when reviewing the interpretation by an administrator of plan terms. The court of appeals expressly recognized the well settled principle that "where [an] ERISA plan confers upon the plan administrator discretionary authority to 'construe the terms of the plan,' the district court should review a decision by the plan administrator under an excess of allowable discretion standard." Pet. App. 12a.[9] In other words, the Second Circuit agrees with all other circuits that courts must defer to an administrator's interpretation of plan language provided that (1) the plan gives the administrator the discretion to interpret the terms of the plan and (2) the interpretation made by the plan administrator is reasonable (*i.e.*, allowable).[10]

In truth, this case involves a dispute over how to characterize what was being interpreted on remand by the district court. As explained above, the Second Circuit correctly held that the relevant plan terms were the very same ones whose interpretation by the Xerox Plan Administrator had been rejected as unreasonable

---

[9] In making this statement, the court cited a prior Second Circuit opinion—*Nichols v. Prudential Ins. Co. of Am.*, 406 F.3d 98, 108 (CA2 2005). And, as the Second Circuit opinion indicates, the *Nichols* decision cited *Firestone*—this Court's seminal decision regarding judicial deference to ERISA plan administrators.

[10] Employing this standard, the Second Circuit—in *Frommert I*—rejected as unreasonable Cross-Petitioners' Pre-1998 Phantom Account Interpretation.

in *Frommert I.* On the other hand, Cross-Petitioners erroneously and unsuccessfully assert that the question on remand required interpretation of different terms.

Even if Cross-Petitioners were correct, however, such error hardly warrants further review. As codified in the Court's rules: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. This Court will "intervene only in what ought to be the rare instance when the [legal] standard appears to have been * * * grossly misapplied." *Mobil Oil Corp. v. FRP,* 417 U.S. 283, 310 (1974) (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 491 (1951)). This is certainly not the highly exceptional case in which further review of factual determinations or application is warranted.[11]

III. Even if the Questions in the Cross-Petition Were Presented, Plenary Review Is Unwarranted.

Plenary review would be unwarranted *even if* the questions in the Cross-Petition were fairly presented. This is true for several reasons:

First, it is far from clear that either of the judicial deference questions presented in the Cross-Petition were outcome determinative. As the Second Circuit explicitly stated in *Frommert I,* the Xerox Plan Administrator's initial interpretation of the relevant offset provisions was "unreasonable under either [a *de novo*

---

[11] Any claim that the unanimous panel grossly misapplied the relevant legal standard is belied by the fact that the suggestion for rehearing *en banc* filed by the Xerox Cross-Petitioners attracted no interest by any member of the entire court of appeals.

or deferential] standard." Pet. App. 44a-45a n. 11. There is nothing in the *Frommert II* opinion to suggest that its holding would be different under a deferential standard of review; the court of appeals simply did not consider the issue.[12]

Second, Cross-Petitioners seek review of an interlocutory order, rather than a final judgment. This Court has long warned that it "should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893).

Third, the circuit conflict alleged by Cross-Petitioners is—*at best*—new, uncertain, and in need of further percolation. According to Cross-Petitioners, the opinion below *creates* a conflict with decisions of the Third, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits on the first question presented. Pet. 12. And, according Cross-Petitioners, the opinion below *creates* a conflict with the Second, Third, Fifth, Sixth, and Eighth Circuits on the second question presented. Pet. 31. At best, therefore, these alleged conflicts are new and involve only one court of appeals—the Second Circuit—in the minority column. Moreover, as explained

---

[12] Cross-Petitioners argue that "the Second Circuit did not suggest that the Plan Administrator had failed to provide a considered interpretation of the Plan." Pet. 14. But they do not claim that the court of appeals determined that the plan administrator's new/alternative interpretation was *reasonable*. Nor could they. The court's opinion is silent on the issue.

in Section I, Cross-Petitioners rely on a fanciful interpretation of the opinion below to reach the conclusion that the Second Circuit has chosen to break with eight sister circuits on two different questions. At best, therefore, the alleged conflicts are uncertain. For these reasons, further percolation is desirable.

Finally, it is worth noting that the court of appeals explicitly held that Cross-Petitioners waived a portion of their argument. Pet. App. 10a ("Regarding the failure of the District Court to remand to the plan administrator, it does not appear from the record that [Cross-Petitioners] actually requested such relief from the District Court. As such, they have waived the issue for appeal.") (citation omitted). Many ERISA cases will necessitate the collection of evidence by the plan administrator. Because of Cross-Petitioners' waiver, this case does not permit the Court to address the full contours of the questions presented.

////

CONCLUSION

For the reasons stated herein, the Frommert Respondents and the Pietrowski Cross-Respondents respectfully request that the Cross-Petition be denied.

Respectfully submitted.

SHAUN P. MARTIN
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
5998 Alcalá Park
San Diego, CA 92110
(619) 260-2347

BRENDAN S. MAHER
Counsel of Record
PETER K. STRIS
STRIS & MAHER LLP
1920 Abrams Pkwy., #430
Dallas, TX 75214
(214) 224-0091

January 2009

OPPOSITION BRIEF

(5)

Supreme Court, U.S.
FILED
JAN 29 2009
OFFICE OF THE CLERK

No. 08-810

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, ET AL.,

Petitioners,

v.

PAUL J. FROMMERT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT H. JAFFE, ESQ.*
MARK B. WATSON, ESQ.
ROBERT H. JAFFE & ASSOCIATES, P.A.
8 Mountain Avenue
Springfield, New Jersey 07081
(973) 467-2246

GEORGE A. SCHELL, ESQ.
SCHELL & SCHELL
410 Perinton Hills Office Park
Fairport, New York 14450
(585) 377-2682

JOHN A. STRAIN, ESQ.
LAW OFFICES OF JOHN A. STRAIN
1611 S. Catalina Avenue - Suite 212
Redondo Beach, California 90277
(310) 944-3670
Attorneys for the Respondents

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF APPENDICES ..... -ii-

TABLE OF CITED AUTHORITIES ..... -iii-

INTRODUCTION ..... -1-

BACKGROUND OF THE CASE ..... -2-

REASONS FOR DENYING THE WRIT ..... -11-

I. THE ISSUES PRESENTED BY THE PETITIONERS MISCHARACTERIZE THE HISTORY OF THIS CASE ..... -11-

II. THE PETITIONERS DISTORT THE OPINION OF THIS COURT IN *GLENN* ..... -12-

III. THE DECISION IN *FROMMERT 2008* IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *GLENN* ..... -14-

IV. PETITIONERS IMPROPERLY IGNORE THE LAW OF THE CASE REGARDING THE TERMS OF THE PLAN ..... -17-

CONCLUSION ..... -24-

TABLE OF APPENDICES

Appendix A - Excerpts of the Summary Plan Description Describing the 1989 Restatement of the Xerox Retirement Income Guarantee Plan 1a

TABLE OF CITED AUTHORITIES

Cases

Administrative Committee of Wal-Mart Health & Welfare Plan v. Willard
393 F.3d 1119 (10th Cir. 2004) . . . . . -19-

Bergt v. Ret. Plan for Pilots Employed by Mark Air
293 F.3d 1139 (9th Cir. 2003) . . . . . -9-

Chiles v. Ceridian Corp.
95 F.3d 1505 (10th Cir. 1996) . . . . . -9-

Edwards v. State Farm Mutual Automobile Ins. Co.
851 F.2d 134 (6th Cir. 1988) . . . . . -9-

Firestone Tire & Rubber Co. v. Bruch
489 U.S. 101 (1989) . . . . . -12-, -15-, -19-, -22-

Frommert v. Conkright
433 F.3d 254 (2d Cir. 2006) . . . . . *passim*

Frommert v. Conkright
472 F.Supp.2d 452 (W.D.N.Y. 2007) . . . . . *passim*

Frommert v. Conkright
535 F.3d 111 (2d Cir. 2008) . . . . . *passim*

Glenn v. Metropolitan Life Ins. Co.
461 F.3d 660 (6th Cir. 2006) . . . . . -16-

Hansen v. Continental Ins. Co.
940 F.2d 971 (5th Cir. 1991) . . . . . -9-

Harte v. Bethlehem Steel Corp.
214 F.3d 446 (3d Cir. 2000) . . . . . -20-

Hunter v. Caliber System, Inc.
220 F.3d 702 (6th Cir. 2000) . . . . . -20-

Jensen v. SIPCO, Inc.
38 F.3d 945 (8th Cir. 1994) ..... -9-

Layaou v. Xerox Corp.
238 F.3d 205 (2d Cir. 2001) ..... -4-

Mathews v. Sears Pension Plan
144 F.3d 461 (7th Cir. 1998) ..... -9-

McNight v. Southern Life & Heath Co.
758 F.2d 1566 (11th Cir. 1985) ..... -10-

Metropolitan Life Ins. Co. v. Glenn
128 S.Ct. 2343 (2008) ..... *passim*

Oliver v. Coca-Cola Co.
546 F.3d 1353 (11th Cir. 2008) ..... -19-

Varity v. Howe
516 U.S. 489 (1996) ..... -17-

Worthy v. New Orleans Steamship Association
342 F.3d 422 (5th Cir. 2003) ..... -20-

Statutes

29 U.S.C. 1104(a) ..... -3-

29 U.S.C. § 1054(h) ..... -6-

29 U.S.C. § 1108(c)(3) ..... -13-, -17-

29 U.S.C. § 1132(a)(1)(B) ..... -13-

29 U.S.C. §1022 ..... -4-

INTRODUCTION

The pending petition for certiorari hopefully constitutes the last chapter in the playbook of Petitioners-Appellants Sally L. Conkright, Patricia M. Nazemetz, Lawrence M. Becker, and Xerox Corporation Retirement Income Guarantee Plan (hereinafter sometimes referred to as "petitioners" or "Xerox") to manipulate the legal process to delay payment of retirement benefits rightly due under the Xerox pension plan to the Respondents-Appellees (hereinafter sometimes referred to as "the plaintiffs"). Since this case was filed nearly ten years ago, three decisions of the Second Circuit have conclusively established that Xerox cannot properly use a "phantom account," consisting of the hypothetical appreciated value of the distribution received by the rehired Xerox employee when previously separated from employment, to reduce the retirement benefits earned by employees who were rehired prior to the publication and distribution of the 1998 Summary Plan Description ("SPD") for such plan.

The issues raised in Xerox's petition do not actually relate to the recent holding of the Second Circuit – which simply upheld the trial court's exercise of discretion specifically remanded to it – and are entirely without merit.[1]

On the other hand, during the course of such remand, Xerox raised an entirely new issue, claiming that a general release document signed by some plaintiffs who retired during this litigation, though not mentioning this case, waived the claims those plaintiffs were litigating. The recent Second Circuit decision sided with Xerox on that claim. The cross-

---

[1]On or about October 20, 2008, this Court denied Xerox's request for a stay of judgment pending a decision on the instant petition for certiorari.

petition for certiorari filed by those plaintiffs who are affected raises important and broad issues that should be addressed by this Court.

BACKGROUND OF THE CASE

In 1989, Xerox Corporation implemented a comprehensive redesign of its retirement program to be effective January 1, 1990. *Frommert v. Conkright*, 433 F.3d 254, 258 (2d Cir. 2006) ("*Frommert 2006*"). Among key changes made, Xerox ceased making contributions to the Xerox Profit Sharing Plan, a defined contribution plan which had been the source of distributions made to rehired Xerox employees when they were previously separated from employment. *Id.* If the rehired employee had any balance left in his Profit Sharing account as of January 1, 1990, it was transferred to a new account established by the redesigned Plan as the Transitional Retirement Account ("TRA"). *Id.* Subsequent to January 1, 1990, this account would increase (or theoretically decrease) based on the investment results of funds in which the employee's Profit Sharing account had been invested. *Id.* at 257.

The redesigned Plan added an alternative benefit known as the Cash Balance Retirement Account ("CBRA"), which also was established by the transfer of the balance the rehired Xerox employee had in his Profit Sharing account, if any, as of January 1, 1990. *Id.* Thereafter, the balance of the CBRA would increase each year by five percent of the employee's salary, and the overall CBRA balance would be credited for interest at a rate of one percent above the one year Treasury Bill rate. *Id.* at 257.

Critically, the basic Xerox retirement plan formula ("hereinafter the RIGP Plan formula") was established in the redesigned Plan to be calculated by multiplying years of service, up to thirty, by 1.4 percent (it was 1.67 percent before January 1, 1990) of the

highest-average yearly pay, a figure arrived at by calculating the average of the employee's five highest-paying calendar years with Xerox. *Id.* As found by the Second Circuit in its comprehensive analysis of the redesigned plan: "For employees rehired by Xerox, the number of years of service includes the total time the employee worked for Xerox, not just the period of employment following rehire." *Id.*

In an SPD captioned "Planning For A Secure Retirement," excerpts of which are included in Appendix A to this brief, Xerox represented that the pension benefit promised Xerox employees who qualify as plan participants "can never be less than that specified by the RIGP formula -- a real advantage, particularly to long service employees, because the formula is very sensitive to years of service." Page 1a.

Having made this representation and similar statements in 1990 personal annual statements with the knowledge that Xerox employees, both newly hired and rehired, would likely rely upon such representations in contemplating and planning a "secure retirement," petitioners — the very persons charged under ERISA Section 404(a), 29 U.S.C. § 1104(a), with a duty of loyalty to the plaintiffs — surreptitiously launched a campaign to deny rehired Xerox employees the pension promised based in part on length of service through the devious device of the "phantom account offset."

The SPDs and annual reports sent to plan participants describing the alternative retirement benefit programs contained in the redesigned Plan (sometimes described as the pre-amendment Plan by the Second Circuit in its opinions) also made reference to a deduction in aggregate benefits for participants who had received prior distributions. As found by the Second Circuit in a related case: "The only relevant language in Xerox's SPD states that '[T]he amount you receive may also be reduced if you previously left the Company and

received a distribution at that time.'" *Layaou v. Xerox Corp.*, 238 F.3d 205, 210 (2d Cir. 2001) ("*Layaou 2001*").

The foregoing disclosure was the only information regarding a potential offset that was provided by the petitioners prior to the publication and distribution of the September 1998 SPD. Xerox's interpretation of Plan terms to allow for implementation of the phantom account offset was found to be unreasonable due to nondisclosure. As set forth by the Second Circuit in *Layaou 2001*:

> The SPD [available to plaintiff John Layaou] does not mention the term "phantom account," describe the "phantom account concept, or even indicate that the choice among the three methods of calculating future benefits will be made by first adding on, and then later offsetting, not the amount of the prior distributions but instead an appreciated value of the prior lump sum distributions. Nor does the SPD offer any example of how to calculate benefits for individuals who had received prior lump -sum distributions.

Id.

The Second Circuit thereafter concluded that the petitioners had violated ERISA Section 102, 29 U.S.C. §1022, stating as follows:

> Because we find that Xerox's SPD failed to provide adequate notice to Layaou that his retirement formula would be determined by adding to the CBRA and TRA an appreciated value of his prior distributions and then offsetting the outcome by that amount, we find that the

> plan administrator's interpretation of the SPD as permitting application of the "phantom account" offset to Layaou's benefits is unreasonable under either an arbitrary and capricious or *de novo* standard of review.

Id. at 211.

In *Frommert 2006*, the Second Circuit, consistent with the decision in *Layaou 2001*, determined that "[t]he prolonged absence of any mention of the phantom account from Plan documents, most notably SPDs, likely, and quite reasonably, led plan participants to believe that it was not a component of the Plan. Rather, rehired employees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received." *Frommert 2006*, 433 F.3d at 267.

The Second Circuit thereafter held:

> It is clear that the application of the phantom account reduced the amount of benefits on which the employees had justifiably relied. The district court's conclusion that the phantom account serves only to allow a comparison between the TRA and CBRA accounts and the RIGP benefit, while perhaps correct in a hyper-technical sense, overlooks the ultimate effect of that comparison. By including a large amount of hypothetical growth in a nonexistent account, the comparison among the three accounts is skewed in favor of selecting either the TRA or CBRA over the RIGP as the basis for payment. However, once either the TRA or CBRA is selected as providing the highest amount of benefits,

> the phantom account value is taken out, leaving a benefit amount significantly less than what the RIGP [Plan formula] would provide. Thus, although the application of the phantom account does not directly deplete an employee's pension account, by altering the comparative process, it imposes a condition on the payment of benefits that leads just as surely to a decrease.

Id. at 268 (citations omitted).

The Second Circuit thereafter found that the "petitioners' reduction of justified expectations of benefits took the form of a retroactive cut-back in violation of [ERISA Section 204(g), 29 U.S.C. 1054(g)]." *Id.* Having previously found that the petitioners had violated ERISA Section 204(h), 29 U.S.C. § 1054(h), which "clearly required the plan administrators to provide fifteen days advance notice of any amendment creating 'a significant reduction in the rate of future benefit accrual,'" *id.* at 266, the Second Circuit then directed the District Court to craft a remedy:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Id. at 268.

Having fully considered the direction of the Second Circuit excerpted above, the trial court began its analysis of how to craft a remedy for the statutory violations of the petitioners as follows:

> This Court's task on remand is made easier in many respects by the breadth of the Second Circuit decision. The Circuit resolved many issues and has clearly established the law of the case in many respects. For example, it can no longer be disputed that employees were not given proper notice in either the Plan or the relevant SPD as to the nature of the phantom account and its operation. Utilization of this phantom account or anything similar to it has been soundly rejected by the Court of Appeals in this case as well as a previous case involving the same Plan, *Layaou v. Xerox Corporation, 238 F.3d 205 (2d Cir. 2001).* Other courts have reached the same conclusion. *Miller v. Xerox Corp. Ret. Income Guarantee Plan, 464 F.3d 871 (9th Cir. 2006), Berger v. Xerox Corp. Ret. Income Guarantee Plan, 338 F.3d 755 (7th Cir. 2003).*[2] It is clear, then, that Xerox may not lawfully use the phantom account mechanism, as to either the named plaintiffs in this lawsuit, or anyone else who was rehired by Xerox prior to 1998, after having previously received a distribution of pension benefits. The Second Circuit has

---

[2] In *Berger v. Xerox Ret. Inc. Guar. Plan*, 338 F.3d 755 (7th Cir. 2003), the Seventh Circuit held that the Xerox RIGP Plan violated ERISA substantive benefit accrual and vesting requirements with respect to the way that the Plan determined lump sum benefits payable in connection with the CBRA.

> addressed this issue more than once, and Xerox may not continue to utilize this rejected formula.

Frommert v. Conkright, 472 F.Supp.2d 452, 456-457 (W.D.N.Y. 2007) ("*Frommert 2007*").

The trial court then commented on the directions it received from the Second Circuit, stating that "Describing the procedure to be utilized prior to the 1998 amendments as 'ambiguous' is generous. In fact, virtually nothing is set forth in either the Plan or the SPD as to the precise mechanism for taking into account a prior distribution in calculating an employee's present benefits after a rehire." *Id.* at 457.

The trial court then referenced the fact that it had reviewed testimony concerning the appropriate methods of treating prior distributions and reached the following conclusion:

> [T]he best course is to do what I did previously in *Layaou* involving a similar remand from the Court of Appeals. *Layaou v. Xerox Corporation, 330 F.Supp.2d 297 (W.D.N.Y. 2004)* ["*Layaou 2004*"]. In *Layaou*, I directed the administrator "to recalculate plaintiff's retirement benefit, ... and to pay plaintiff a lump sum in the amount of the difference between the amount of benefits that plaintiff has received, and the amount of the recalculated benefit, without any consideration of a 'phantom account.'" *Id. at 305* (footnote omitted). I added that "[i]t would not be unreasonable ... for the administrator to subtract out the amount of the prior distribution," in order to avoid giving the plaintiff a windfall, but left it to the Plan administrator to perform the actual

> calculation of the plaintiff's benefits in the first instance, stating that "[i]f plaintiff believes that the administrator's calculation is erroneous, and the matter cannot be resolved between the parties, he can seek further relief in this Court." *Id. at 304.*
>
> The same process should apply here. This process is straightforward; it adequately prevents employees from receiving a windfall, and I believe it most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD.

Id. at 458. The methodology outlined by the trial court in *Frommert 2007* hereinafter will be referred to as "the *Layaou 2004* methodology." Indeed, the *Layaou 2004* methodology is the very method described in the 1989 SPD "Planning For A Secure Retirement"as constituting the manner by which a retiring employee can calculate his pension entitlement. *See infra* at pp. 3a-4a. Accordingly, the decision of the trial court in *Frommert 2007* is totally consistent with the concept which permeates *Frommert 2006* namely, that in the event of any conflict between the SPD and the terms of the plan or the plan administrator's interpretation of the plan, the SPD controls. *Frommert 2006*, 433 F.3d at 265.[3]

---

[3] The concept that the SPD controls in the event of a conflict has been consistently applied outside the Second Circuit. *See Hansen v. Continental Ins. Co.*, 940 F.2d 971, 981-83 (5th Cir. 1991); *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466 (7th Cir. 1998); *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994); *Bergt v. Ret. Plan for Pilots Employed by Mark Air*, 293 F.3d 1139 (9th Cir. 2003); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1518-19 (10th

The district court rendered judgment on two points: (1) that the *Layaou 2004* methodology should be the appropriate relief for the statutory violations of the petitioners/appellants and (2) that the execution of the Xerox general release form in consideration of the receipt of severance pay was unenforceable as a bar to the ERISA claims of the respondents/appellees. Xerox appealed these rulings to the Second Circuit.[4]

More than a year after the decision in *Frommert 2007*, on July 24, 2008, the Second Circuit held that a decision of the District Court determining that the *Layaou 2004* methodology was the appropriate method to calculate the retirement benefits of Xerox employees rehired prior to the September 1998 SPD was within scope of the District Court's discretion.[5]

Cir. 1996); *McNight v. Southern Life & Heath Co.*, 758 F.2d 1566 (11th Cir. 1985).

[4] It is very important to note that the petitioners did not challenge the Second Circuit's direction in *Frommert 2006* to the trial court that it should craft appropriate relief employing equitable principles, if necessary. Moreover, they submitted to an evaluation whereby the trial court was presented with and considered alternative methodologies, including the *Layaou 2004* methodology, the new hire methodology, and the plan administrator's approach. Only when the trial court rendered its decision in favor of the *Layaou 2004* methodology did Xerox too late decide to challenge the decision of the Second Circuit to have the trial court craft a remedy for Xerox's statutory violations.

[5] Notwithstanding the fact that the petitioners had been found to be serial violators of ERISA statutes designed to protect pensioners, the Second Circuit vacated the ruling of the trial court that the Xerox general release form was unenforceable due its ambiguous content and the failure of the plan administrators to demonstrate that the severance payments received were in excess of the ERISA claims deemed

Frommert v. Conkright, 535 F.3d 111, 119 (2d Cir. 2008) ("*Frommert 2008*").

REASONS FOR DENYING THE WRIT

I. THE ISSUES PRESENTED BY THE PETITIONERS MISCHARACTERIZE THE HISTORY OF THIS CASE

The two challenges presented by Xerox have little or no relevance to the decision (i.e., *Frommert 2008*) being appealed. Petitioners mischaracterize the remand as if the District Court had been directed to interpret and apply the Plan. It was not, but rather was directed to exercise equitable powers in crafting an appropriate remedy after Xerox's position regarding the interpretation of the plan (including the related SPD) had been soundly rejected. Xerox effectively asks this Court to negate the law of the case, as established in earlier Second Circuit holdings.

Xerox's first issue asserts that the Second Circuit erred by holding that the District Court had "no obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of [a pension] plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits." The *Frommert 2008* decision simply did not involve a review of an interpretation of the plan, but rather upheld the trial court's choice of the *Layaou 2004* methodology as a means of allowing Xerox some equitable credit for prior payments from its Profit Sharing Plan, where prior decisions had determined

---

to be waived. This ruling is the subject of a separate petition for certiorari by the plaintiffs which we believe merits being granted by this court.

that applicable plan and SPD terms did not provide for an offset.

Xerox's second assertion, that the Court of Appeals should have looked at the matter *de novo*, again ignores the history and law of the case. Where the Court of Appeals had specifically remanded the case to the District Court to "craft" an appropriate remedy, it is absurd to claim that the Second Circuit should then brush that remand aside and craft such remedy itself *de novo*. Again, *Frommert 2008* was not about determining the meaning of a plan, but rather the equitable determination of a proper final remedy.

In *Frommert 2008*, the Second Circuit in fact held that the *Layaou 2004* methodology did not exceed the District Court's allowable discretion since the prior opinion of the Second Circuit "presumed that the District Court would craft the remedy itself." *Frommert 2008*, 535 F.3d at 118. Accordingly, this Court should forthwith reject the petition for certiorari filed by petitioners as raising issues not relevant to the analysis and ruling of the court below.

II. THE PETITIONERS DISTORT THE OPINION OF THIS COURT IN *GLENN*

The petitioners cite *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343 (2008), as holding that when a pension plan grants a plan administrator the authority to interpret its terms, the administrator's interpretation of the plan language is entitled to deference. Petitioners' brief at 12. In fact, in *Glenn* this Court did not amplify the deference that should be given to an interpretation of plan documents by a plan administrator. Rather, it expanded the "fourth principle" under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) ("*Bruch*"), which holds that a plan administrator's conflict of interest with plan beneficiaries is a factor that should be considered in

judicial review of a benefits determination by a fiduciary or administrator under 29 U.S.C. § 1132(a)(1)(B). *See infra* at pp. 19-20 for further discussion of the four principles referenced in *Glenn*.

The first question posed by the Sixth Circuit decision in *Glenn* was whether the fact that a plan administrator both evaluates claims for benefits and also pays those same claims creates the kind of conflict of interest where this fourth principle should apply. The answer given in *Glenn* is that where, as here, the employer both funds the plan and evaluates the claims, it creates the type of clear conflict of interest that judges must take into account as a factor when they review the discretionary acts of a plan administrator. *Glenn*, 128 S.Ct. at 2343.

In response to MetLife's contention that, among other things, ERISA Section 408(c)(3), 29 U.S.C. § 1108(c)(3), specifically allows employers to administer their own ERISA plans, this Court held that this statutory provision was outweighed by "Congress' decision to offer employees enhanced protection for their benefits." *Id.* Turning to the question of how a conflict such as the one identified in *Glenn*, which parallels the conflict of interest circumstances in the instant case, should be taken into account on judicial review of a discretionary benefits determination, this Court held that such conflict should be "weighed as a factor in determining whether there is an abuse of discretion." *Id.* It then cautioned that conflicts of interest are but one factor among many that a reviewing judge must take into account. *Id.*

If this case actually involved interpretation of terms of the applicable plan, the now long history of litigation over Xerox's plan would need to be taken into account. Despite repeated losses in the Courts of Appeals, Xerox stubbornly fights on. There could hardly be a clearer case to apply the principles set forth in *Glenn* so as to

preclude any deference to Xerox's latest interpretations.

However, it is simply unnecessary to reach any *Glenn* factors. As discussed above, the holding in *Frommert 2008* affirming the trial court's choice of the *Layaou 2004* methodology to allow Xerox some offset is the culmination of holdings reached in several prior decisions constituting the law of this case. This choice was based on many facts and equitable factors, including key holdings that the SPD violated ERISA Section 102.

The petitioners' contention that deference should be given to the decision of the Xerox Plan Administrators to utilize the phantom account offset or a different equivalent approach can be described as *chutzpah in extremis*. The creative attempt by the petitioners to turn this case into one raising the question of whether the Second Circuit failed to give appropriate deference to the opinion of the Xerox Plan Administrators outside the context of a benefits determination must be denied and their petition for certiorari rejected.

III. THE DECISION IN *FROMMERT 2008* IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *GLENN*

Nothing in this case is at odds with this Court's recent pronouncement in *Glenn* or with its predecessor *Bruch*. In *Glenn*, "this Court warned against the use of 'talismanic' rules and formulas as a substitute for the art of judging." *Glenn*, 128 S. Ct. at 2353. In addressing how the trial court should take conflicts of interest into account, this Court in *Glenn* stated:

> Benefits decisions arise in too many contexts, concern too many circumstances, and can relate in too many different ways to conflicts – which

> themselves vary in kind and in degree of seriousness – for us to come up with a one-size-fits-all procedural system that is likely to promote fair and accurate review.

Id. at 2351.

The petitioners assert that the Second Circuit carved out a broad exception to the deference principle enunciated in *Bruch* and *Glenn* when it held that no deference is due to a plan administrator's interpretation of plan language when the administrator interprets the plan outside of the plan's administrative claims process. *See* Petition at 12. Elsewhere, the Petition cites *Frommert 2007* for the proposition that the deference due to a plan administrator applies only when a plan administrator offers its interpretation of the plan in the course of an administrative determination of a participant's benefit.

Contrary to the spin placed upon *Glenn* by the petitioners, the decision in *Glenn* did not expand the concept of deference due to a plan administrator, but rather expanded the concept of what constitutes a conflict of interest from a brief reference to this concept in *Bruch, 489 U.S. 101* (1989). As stated in *Glenn*:

> We here decide that this dual role [of being both the employer and payor of benefits of a pension plan] creates a conflict of interest; that a reviewing court should consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits; and that the significance of the factor will depend upon the circumstances of the particular case. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

Glenn, 128 S. Ct. at 2346.

In accordance with the expanded concept of what constitutes a conflict, this Court affirmed the Sixth Circuit decision in *Glenn v. Metropolitan Life Ins. Co.*, 461 F.3d 660 (6th Cir. 2006), holding that where a plan administrator both evaluates and pays claims, he "operates under a conflict of interest when making discretionary benefit determinations." *Glenn*, 128 S. Ct. at 2347.

The opinion in *Glenn* goes on to state that the Solicitor General suggested that this Court also consider "how" any such conflict should be taken into account on judicial review of the discretionary benefit determination. This Court gave a four part response. First, it determined that a plan administrator holds a position analogous to a trustee of a common law trust and should consider a benefits determination to be a fiduciary act to which the administrator owes a special duty of loyalty to the plan beneficiaries. *Id.* at 2347. Second, this Court held that principles of trust law require courts to review a denial of trust benefits under a *de novo* standard unless the plan provides to the contrary. *Id.* at 2348. Third, where the plan provides the administrator discretionary authority to determine eligibility for benefits, trust principles make a deferential standard of review appropriate. *Id.* Fourth and last, this Court held that where a benefit plan gives discretion to an administrator operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion. *Id.* The *Glenn* decision then focused on the fourth principle and held there clearly is a conflict of interest "where [as here] it is the employer that both funds the plan and evaluates the claims." *Id.* "In such a circumstance, 'every dollar provided in benefits is a dollar spent by . . . the employer; and every dollar saved . . . is a dollar in [the

employer's] pocket." *Id.* (*citing Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 144 (3d Cir. 1987)).

This Court then further reviewed the heightened consideration that should be given to a plan administrator operating under a conflict of interest, finding that ERISA is consistent with trust law in circumstances where a court approves a trustee's conflict. These circumstances "[do] not change the legal need for a judge to take account of that conflict in reviewing the trustee's discretionary decision making. *Glenn*, 128 S. Ct. at 2349 (internal citations omitted).

In response, Metropolitan Life contended in *Glenn* that to find a conflict in a situation where the plan administrator has discretionary authority was inconsistent with an ERISA provision specifically allowing employers to administer their own plans. *See* 29 U.S.C. § 1108(c)(3). Continuing to cite trust principles where a court must approve a trustee's conflicted decision making, this Court found the statutory exception was outweighed by "Congress' desire to offer employees enhanced protection from the benefits." *Id.* (citing *Varity v. Howe*, 516 U.S. 489, 497 (1996) (discussing "competing congressional purposes" in enacting ERISA)).

IV. PETITIONERS IMPROPERLY IGNORE THE LAW OF THE CASE REGARDING THE TERMS OF THE PLAN

As the District Court noted in *Frommert 2007*: "The Circuit resolved many issues and has clearly established the law of the case in many respects." *Frommert 2007*, 472 F.Supp.2d at 456. By the time this case had been remanded back to the District Court, it had already been determined that the applicable terms of the Plan itself did not provide for *any* offset of Plan benefits for prior distributions from the predecessor of the CBRA and the TRA. In

Frommert 2006, the Second Circuit determined that "under either an arbitrary or capricious standard or as a matter of law, that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable." *Frommert 2006*, 433 F.3d at 265-66. In *Frommert* 2006, the Second Circuit also rejected the contention that separate non-duplication terms (under Section 9.6 of the Plan) applied with respect to the prior distributions involved in this case, which had been made from Xerox's previous Profit Sharing Plan:

> As the defendants conceded at oral argument, as well as in their submission to the court, the 1989 Restatement did not specify how the Plan would account for the prior distributions of the newly created CBRA and TRA accounts, and, more significantly, made no mention of the phantom account offset or the fact that the hypothetical increased value of the prior distribution would be factored into the calculation of a rehired employee's benefits.

Id. at 258.

Having reached these conclusions, the Second Circuit remanded the case, pointing out "the ambiguous manner in which the pre-amendment terms of the Plan described prior distributions" and "suggest[ing] that [the District Court] may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." *Id.* at 268.

The District Court then did exactly as it had been directed to do. It fashioned an equitable remedy with the stated goal of providing the plaintiffs only what they might reasonably have expected and thus avoiding an employee "windfall." The offset that was

allowed in this case — the actual amount of the distribution previously received — was not based on existing Plan terms at all, but on the court's inherent equitable authority (and the specific directions made on remand to that court). In other words, the fact that any offset was permitted did not result from applicable "terms of the plan" but from equitable notions that *limited* the recovery due to plaintiffs under literal terms of plan documents.

The second leg of Xerox's petition, asserting that the Court of Appeals should have reviewed the trial court's "interpretation of the plan" *de novo* ignores all of the foregoing history of this case. Moreover, nothing in *Bruch* and *Glenn* remotely suggests that the court's equitable authority should have been transferred to the Plan Administrator, and the Circuit Court cases cited in Xerox's Petition do not hold otherwise. For example, *Oliver v. Coca-Cola Co.*, 546 F.3d 1353 (11th Cir. 2008), involved a denial of long term disability benefits. When the Circuit Court determined that the plaintiff qualified for such benefits, no determination had been made about how those benefits should be calculated under the terms of the company's plan. Thus, the Circuit Court called for the case to be remanded to the plan administrator to make an initial application of the plan.

To briefly comment on the other cases cited by the petitioners, the decision in *Administrative Committee of Wal-Mart Health & Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004), dealt with a situation where the plan administrators filed suit for reimbursement of medical expenses from a tort settlement. In these circumstances, the deference given to the plan administrator was intimately related to the benefits paid for which reimbursement was sought. As such, the court gave deference to the plan administrator's interpretation of the plan's subrogation provision. This interpretation certainly was related to a previous administrative

determination that the participant was entitled to medical benefits under the plan.

In *Worthy v. New Orleans Steamship Association*, 342 F.3d 422 (5th Cir. 2003), the court determined whether a union local was entitled to a position on the Board of Trustees of a union association. Until the court reached a decision on that issue, no deference was given to the plaintiff union local. This is a far cry from the situation in this case, where the trial court, acting within the discretion granted to it by the Second Circuit, chose the methodology to be utilized to calculate a rehired Xerox employee's pension entitlement without implementation of the phantom account offset.

The petitioners also cite *Hunter v. Caliber System, Inc.*, 220 F.3d 702 (6th Cir. 2000), as an exception to the rule that deference should be paid to a plan administrator's benefit determination. However, the precise holding in *Hunter* is that "this case *is* about benefits, and *Firestone* [*Bruch*] requires application of the arbitrary and capricious standard if required by the language of the plan." *Hunter*, 220 F.3d at 711. Here, the Second Circuit concluded that, in the event of a conflict between an SPD and the plan or the plan administrator's interpretation of the plan, the SPD controls; the trial court was bound by that concept.

Finally, the decision in *Harte v. Bethlehem Steel Corp.*, 214 F.3d 446 (3d Cir. 2000), clearly deals with a denial of benefits where the opinion of the plan administrator ordinarily would be entitled to deference. As found by the *Harte* court, the plaintiff was "days short of being eligible for pensions which would provide greater benefits than the deferred vested pension to which he is currently entitled." *Harte*, 214 F.3d at 449. This holding is clearly inapposite to the essential holding here, where the Second Circuit found as a matter of law that the phantom account offset, the devious device employed

by Xerox to retroactively reduce the plaintiffs' pension entitlement, violated ERISA Section 204(g). *Frommert 2006*, 433 F.3d at 265-266 (observing that "[i]t is clear, under either an arbitrary or capricious standard or as a matter of law, that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable").

The portion of the *Frommert* 2008 decision addressed in Xerox's Petition involves Xerox's "challenge [to] the District Court's *remedy* for the ERISA violations [the Second Circuit] identified in [its] prior decision." *Frommert 2008*, 535 F. 3d at 117 (emphasis added). Accordingly, the question of whether the District Court was required to remand determinations to the Plan Administrator was resolved by the decision in *Frommert 2006* and was the law of the case by the time of the appeal in *Frommert* 2008. Although *Frommert 2006* "did not prohibit the District Court from remanding the case to the plan administrator, the language in [the Second Circuit's] prior opinion presumed that the District Court would craft the remedy itself." *Id.* at 118. Thus, in *Frommert* 2008, the Second Circuit declared that it "would review the District Court's decision to fashion a remedy itself instead of remanding to the plan administrator for an excess of allowable discretion." *Id.*

As determined by the Second Circuit in *Frommert 2008*, the trial court did not ignore the remedy suggested by the Plan Administrator, which has been designated as "the Plan Administrator's Approach." The Second Circuit noted that the District Court considered expert testimony regarding which of the various proposed remedies was most fair and equitable. Indeed, the Plan Administrator's Approach was deemed to be a potential alternative to the "new hire methodology" advocated by the petitioners on appeal as a substitute for the phantom account offset. It was not a determination by the Plan Administrator

to which deference should be given in accordance with the four principles stipulated in *Glenn*.

As cogently observed by the Second Circuit, the District Court "had no decision to review because the plan administrator never rendered any decision other than the original benefit determinations, all of which were premised on the now-impermissible 'phantom account' offset mechanism." *Frommert* 2008, 535 F.3d at 119. Notwithstanding, petitioners make the outrageous suggestion that deference should be given to the same administrator who violated the law when he recommends a remedy for his violation. To use an old saw, the petitioners seek not only to have the fox guard the chickens but also decide how to cook them.

Xerox's Petition cannot contend that the District Court should have remanded this case to the Plan Administrator for a new benefit determination after the case was remanded to the District Court. That claim would be inconsistent with the terms of the remand. Moreover, *Frommert 2008* points out that any such claim was waived, since it was not made at the level of the District Court. *Id.* at 118. The basis for the claims in Xerox's Petition instead is that *Bruch* and *Glenn* required the District Court to favor the litigation position of the Plan Administrator or Plan sponsor over that of plan participants when using equitable powers to craft a remedy. Of course, nothing in *Bruch* or *Glenn* suggests any such thing.

A basic tenet of Glenn is that the District Court must be able to consider factors relevant to the particular context in which the question arose. Thus, Xerox apparently is claiming that *Frommert* 2008 carved out a "broad exception" as a result of the conclusion expressed in the following single sentence of *Frommert* 2008:

> Defendants-Appellants have identified no authority in support of the proposition

> that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA.

Id. at 119.

That statement does not say that a trial court must adopt a "talismanic" refusal to consider deference in a "litigation context." It merely recognizes that an appropriate consideration of relevant factors, including conflicts that are indisputably here in this case, was left to the District Court to determine on remand. To reiterate, the District Court made an appropriate application of its equitable discretion as it was directed to do.

Moreover, the Second Circuit concluded (based on cited authorities) that it would have been futile to "remand" such a determination to plan administrators that not only were acting under a conflict but had obviously shown over a decade of litigation that they had dug in and were committed to defeating the claims of plan participants made in this case. As set forth in the "Background of the Case" portion of this brief, three separate decisions of the Courts of Appeal have determined – for three separate reasons – that the benefit determinations made by the Plan Administrator substantially shortchanged Plan Participants in the circumstances of the plaintiffs in this case.

When *Frommert* was remanded to the District Court, Xerox still insisted that Plan Participants' benefits should be reduced by the "phantom account." Indeed, such resistance continues today, as evidenced by the opinion in *Frommert 2008*. *See Frommert 2008*, 535 F.3d at 122 ("counsel for Defendants-Appellants

represented to this Court at oral argument that several of these Plaintiffs-Appellees had already received pension benefits, *albeit calculated under the 'phantom account' offset method*") (emphasis added). This intransigence was certainly a factor which the District Court considered in exercising on remand the equitable authority given to it by the Second Circuit. The District Court undoubtedly understood that the prolongation of this litigation effectively denies benefits to Plan participants who are aging (and in some cases have died). Xerox's position on this appeal — that the District Court *must* always defer to the Plan Administrator (and thus to the plan sponsor) where, as here, a conflict of interest clearly exists and where petitioners have been found to have violated ERISA statutes designed to protect pensioners — is unsound and provides no reason for review by this Court.

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Supreme Court decline to review the questions presented by the Petitioners.

Dated: January 28, 2009

Respectfully submitted,
Robert H. Jaffe, Esq.
Mark B. Watson, Esq.
ROBERT H. JAFFE & ASSOCIATES, P.A.
8 Mountain Avenue
Springfield, New Jersey 07081
(973) 467-2246

George A. Schell, Esq.
SCHELL & SCHELL
410 Perinton Hills Office Park
Fairport, New York 14450
(585) 377-2682

John A. Strain, Esq.
LAW OFFICES OF JOHN A. STRAIN
1611 S. Catalina Avenue - Suite 212
Rodondo Beach, California 90277
(310) 944-3670

APPENDIX

APPENDIX A

EXCERPTS FROM "PLANNING FOR A SECURE RETIREMENT," THE SUMMARY PLAN DESCRIPTION DESCRIBING THE 1989 RESTATEMENT OF THE XEROX RETIREMENT INCOME GUARANTEE PLAN

Excerpt from Page 1.2 through 1.4

The Retirement Program - Two plans comprise the Xerox retirement program: the Retirement Income Guarantee Plan, and the Xerox Profit Sharing and Savings Plan. In addition, Xerox funds a major capital accumulation opportunity for employees through the Employee Stock Ownership Plan, although this plain is not a form part of the retirement plan.

Retirement Security and Individual Accounts – The Xerox retirement program combines the advantages of defined benefit plants and individual accounts.

A defined benefit plan specifies, usually in a formula, the benefit payable to retirees. The company maintains assets in a separate trust fund. And the company – not the employee – bears the risk associated with the investment of the fund's assets. That makes pension plans more expensive for companies to fund and manage.

The pension benefit can never be less than that specified by the formula – a real advantage, particularly to long-service employees, because the formula is very sensitive to years of service. But a straight pension benefit can never be more than what the formula yields. That can be a disadvantage, especially to short-service employees. For short-service employees, the individual account typically yields a higher benefit than the formula.

The Xerox retirement program is a hybrid plan,

combining the features of the defined benefit plan and individual accounts. In the Xerox retirement program, the defined benefit is backed by individual accounts. If your individual account would provide a benefit greater than the benefit yielded by the retirement income guarantee formula, you will receive the higher amount.

Each employee has a cash balance retirement account, which always increases; it can never suffer negative investment results. This account grows at a fixed annual rate. This annual rate, which will be determined before the beginning of the year and which will vary from year to year, is based upon the prior calendar year's average yield of the one-year Treasury bill. Specifically, the interest rate will be calculated by averaging the one-year Treasury bill yield as of the first business day of each of the 12 months for the prior calendar year, plus one percent. In addition, your account will be credited annually with an amount equal to 5 percent of previous year's pay.

Employees who were eligible for profit sharing in 1989 also will have a transitional retirement account. The value of this account varies – up or down – depending on investment results of the General Fund or Guaranteed Fund. The benefits that would be provided by the transitional retirement account will be compared with both the benefits provided by the cash balance retirement account and the retirement income guarantee. The employee will receive whichever yields the greatest benefit.

If you leave the company after becoming vested (five years service), you are entitled to take your benefit with you. You can roll over your benefit into an IRA when you leave, making your Xerox retirement benefits "portable."

Excerpt from Page 2.1 through 2.3

Retirement Income Guarantee Plan – The Retirement Income Guarantee Plan is designed to help assure your future financial security by providing a lifetime income to you and your spouse, if you are married, when you retire from Xerox. The plan also may provide benefits if you leave Xerox before retirement.

The government in addition to your Xerox retirement income pays Social Security retirement benefits.

How the Retirement Income Guarantee Plan works and what it can mean to you and your family is described in this section.

Eligibility - As an employee of a Xerox participating company, you participate in the Retirement Income Guarantee Plan on your first day of work.

Cost – The company pays the entire cost of providing your retirement income guarantee.

Retirement Dates – You are eligible to retire when you have reached age 55 and completed 10 years of service.

Normal retirement is the first day of the month after you reach age 65 (or your 65th birthday, if it occurs on the first of the month). Deferred retirement – after age 65 – is also permitted.

Your retirement income guarantee will be based on your age, your highest-average pay and your years of service.

Retirement Income Guarantee – When you retire from Xerox, the company guarantees to pay you whichever provides you with the greatest retirement benefit from these sources:

* Your benefit under the retirement income

guarantee formula (1.4% x highest average pay x years of service, up to 30 years and adjusted for early retirement, if necessary), or

* Your cash balance retirement account, or

* Your transitional retirement account, if any.

If you are eligible for benefits from other Xerox retirement plans, income predecessor plans; your benefit from the Retirement Income Guarantee Plan could be reduced to account for the income you will be receiving from those plans. The amount you receive may also be reduced if you had previously left the company and received a distribution at that time; or if Xerox has accepted a qualified domestic relations order to distribute a portion of your funds to an alternate payee.

Highest-average pay means the average of your pay during your five best-paid calendar years with Xerox after 1974; these years needs not be consecutive. For purposes of the retirement program, your pay equals your base pay, overtime, bonuses, commissions, and lump-sum wages (except salary continuance paid as a lump sum), up to the federally mandated limit of $200,000. (This maximum may be indexed in the future.).

The term service, as used in the formula, basically includes all your years of employment with Xerox, up to a maximum of 30 years. Not included are service before January 1, 1976, if you left the company prior to that date and returned after that date; service with subsidiaries that have not adopted the retirement program; or service in collective bargaining units not participating in the retirement program (other than the ACTWU). If you are uncertain about any of the service, check with your personnel representative.

REPLY BRIEF

Supreme Court, U.S.
FILED
FEB 10 2009
OFFICE OF THE CLERK

No. 08-810

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET AL.,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEFS IN OPPOSITION

MICHAEL D. RYAN
XEROX CORPORATION
45 Glover Avenue
Norwalk, CT 06856

MARGARET A. CLEMENS
NIXON PEABODY LLP
Clinton Square
P.O. Box 31051
Rochester, NY 14603

ROBERT D. WICK
Counsel of Record
RICHARD C. SHEA
ROBERT S. NEWMAN
CHRISTIAN J. PISTILLI
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Petitioners

February 2009

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

REPLY BRIEF 1

I. REVIEW SHOULD BE GRANTED ON THE FIRST QUESTION. 1

A. The *Frommert* Respondents' Arguments On The First Question Lack Merit. 2

B. The *Pietrowski* Respondents' Arguments On the First Question Lack Merit. 6

C. Petitioners Did Not Waive The First Question. 10

II. REVIEW SHOULD BE GRANTED ON THE SECOND QUESTION. 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Almonte v. *City of Long Beach*,
478 F.3d 100 (2d Cir. 2007) 6

Cook v. *Liberty Life Insurance Co.*,
320 F.3d 11 (1st Cir. 2003) 12

Firestone Tire & Rubber Co. v. *Bruch*,
489 U.S. 101 (1989) 6

Gallo v. *Amoco Corp.*,
102 F.3d 918 (7th Cir. 1996) 9

Grosz-Salomon v. *Paul Revere Life Insurance Co.*, 237 F.3d 1154 (9th Cir. 2001) 9, 13

Hathorn v. *Lovorn*, 457 U.S. 255 (1982) 3

Metropolitan Life Insurance Co. v. *Glenn*,
128 S. Ct. 2343 (2008) ..... *passim*

Oliver v. *Coca-Cola Co.*,
546 F.3d 1353 (11th Cir. 2008) 9

Pakovich v. *Broadspire Services, Inc.*,
535 F.3d 601 (7th Cir. 2008) 9

United States v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186 (1950) 3

FEDERAL STATUTES

29 U.S.C. § 1132 2

REPLY BRIEF

I. REVIEW SHOULD BE GRANTED ON THE FIRST QUESTION.

The Second Circuit held that the District Court owed no deference to the Plan Administrator's interpretation of the Plan because his interpretation was offered in litigation rather than in the context of a "benefit determination." (Pet. App 13a.) That holding departed from decisions of this Court and other Circuits requiring deference to a plan administrator's interpretation of an ERISA plan *to the extent provided by the plan documents and the common law of trusts.* (Pet. 12-22.) The Second Circuit's decision to strip away this deference for reasons entirely unrelated to the plan documents or the law of trusts will have disastrous consequences for the nation's ERISA plans and will discourage employers from offering such plans. (Business Roundtable Amicus Br. at 8-12.) Neither the *Frommert* Respondents nor the *Pietrowski* Respondents provide a persuasive reason for denying review of this question.[1]

---

[1] "*Frommert* Respondents" refers to the 33 Respondents represented by Robert H. Jaffe & Associates; "*Pietrowski* Respondents" refers to the 69 Respondents represented by Stris & Maher LLP.

A. The *Frommert* Respondents' Arguments On The First Question Lack Merit.

The *Frommert* Respondents assert that the District Court was not interpreting the Plan at all, but instead was "exercis[ing] equitable powers in crafting an appropriate remedy." (*Frommert* BIO at 11.) Respondents are fundamentally mistaken. The Second Circuit expressly recognized that the "relief that the [Respondents] seek[] [is] recalculation of their benefits consistent with the terms of the Plan." (Pet. App. 53a.) Accordingly, after holding that the Plan's so-called "phantom account" offset provision could not be applied to Respondents, the Second Circuit remanded to the District Court to award any additional benefits due under the "pre-amendment terms of the Plan," *i.e.*, the terms of the Plan before the date that the "phantom account" provision was properly disclosed to Plan participants. (*Id.* at 51a.) Respondents' assertion that this case does not present an issue of Plan interpretation thus conflicts with the Second Circuit's express instructions to the District Court.

Respondents also overlook the fact that the Second Circuit directed the District Court to award a remedy under ERISA § 502(a)(1)(B) as opposed to § 502(a)(3). (*Id.* at 53a.) Section 502(a)(1)(B) authorizes district courts to award only those benefits due a participant "under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). The fact that the relief here was afforded under § 502(a)(1)(B) thus eliminates any doubt that the courts below were interpreting Plan terms.

Equally unavailing is Respondents' suggestion that the "law of the case" prevents Petitioners from seeking review of the Second Circuit's 2006 decision in *Frommert I*. (*Frommert* BIO at 11.) The question presented for review – whether deference is due to a plan administrator's interpretation of an ERISA plan rendered outside of an administrative claim for benefits – arises from the Second Circuit's 2008 decision, not its 2006 decision. (Pet. App. 12a-13a.)

Furthermore, even if Respondents were correct that the question presented arises in part from the 2006 decision, this Petition still would be timely. The 2006 decision was interlocutory: it resulted in a remand for a determination of any additional benefits due to Respondents. As the *Pietrowski* Respondents correctly observe, this Court generally prefers to review questions presented by interlocutory decisions of the courts of appeals at the conclusion of the case. (*Pietrowski* BIO at 16.) The discretionary law of the case doctrine does not preclude this Court's review of such interlocutory decisions. *See Hathorn* v. *Lovorn*, 457 U.S. 255, 261-62 (1982); *United States* v. *United States Smelting Refining & Min. Co.*, 339 U.S. 186, 199 (1950).

The *Frommert* Respondents also assert that the Plan Administrator's interpretation of the pre-amendment Plan terms was unreasonable because the Plan does "not provide for *any* offset of Plan benefits for prior distributions." (*Frommert* BIO at 17.) Not so. As originally interpreted by the Plan Administrator, the Plan contained two different offset provisions: a non-duplication of benefits provision and the so-called "phantom account" offset

provision. The decision in *Frommert I* merely held that the "phantom account" provision was not properly added to the Plan until 1998; it did not disturb the non-duplication of benefits provision. (Pet. 7.) To the contrary, the Second Circuit acknowledged that "the Plan . . . *always* contained provisions concerning the offset of prior distributions," including the non-duplication of benefits provision. (Pet. App. 26a-28a (emphasis added).)[2]

On remand from *Frommert I*, the Plan Administrator offered an interpretation of the offset required by the non-duplication of benefits provision, without reference to the "phantom account" offset. Contrary to Respondents' assertion (*Frommert* BIO at 17-18), that interpretation was *not* the same interpretation of the Plan rejected in *Frommert I*. Moreover, although the Second Circuit recognized that there were "several reasonable alternatives" for construing the non-duplication of benefits provision (Pet. App. 13a-14a), it never reached the question of whether the Plan Administrator's interpretation was

---

[2] The Summary Plan Description ("SPD") likewise informed Plan participants that their benefits "may . . . be reduced if [they] had previously left the company and received a distribution at that time." (*Frommert* BIO App. 4a.) The *Frommert* Respondents' assertion (at 9) that "in the event of any conflict between the SPD and the . . . plan administrator's interpretation of the plan, the SPD controls" is therefore irrelevant. The Second Circuit held only that the "phantom account" methodology was inadequately disclosed in the SPD until 1998, not that the offset required by the Plan Administrator's interpretation was inadequately disclosed.

among these reasonable alternatives. Instead, the court dismissed this interpretation as the "mere opinion" of the Plan Administrator and refused to accord it any deference. (*Id.*)

Finally, the *Frommert* Respondents argue that no deference was due to the Plan Administrator's interpretation of the non-duplication of benefits provision because the Plan Administrator offered his interpretation in a "litigation context," and thus labored under a conflict of interest. (*Frommert* BIO at 23-24.) This argument is foreclosed by *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008).

Glenn holds that a deferential standard of review applies even when a plan administrator acts under a financial conflict of interest. *See id.* at 2350. Thus, under *Glenn*, the fact that a plan administrator offers an interpretation of a plan in a "litigation context" could be considered as a "factor" in reviewing the interpretation for abuse of discretion, but it provides no basis for engaging in *de novo* review. *See id.* Here, the decisions below did not merely treat the fact that the Plan Administrator's interpretation arose in litigation as a "factor" in reviewing for abuse of discretion. Instead, contrary to *Glenn*, the courts below refused to accord the Plan Administrator any deference whatsoever. (Pet. App. 12a-13a.)

B. The *Pietrowski* Respondents' Arguments On the First Question Lack Merit.

Unlike the *Frommert* Respondents, the *Pietrowski* Respondents do not dispute that the question presented is one of plan interpretation. Nor do they deny that, in reviewing the District Court's interpretation of the Plan, the Second Circuit applied a perceived exception to the general rule requiring *Firestone* deference to the interpretations of plan administrators. *See Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989). They argue instead that the Second Circuit was *correct* in applying an exception to *Firestone* deference.[3]

According to the *Pietrowski* Respondents, the Plan Administrator merely offered a different interpretation of the exact same Plan terms following the remand from *Frommert I.* (*Pietrowski* BIO at 8.) Under these circumstances, they argue, no deference was due to the Plan Administrator's interpretation of the Plan because it was a mere "litigation position[]." (*Id.* at 9.) This argument fails for two reasons.

First, the Plan terms interpreted on remand were *not* identical to those upon which the Plan

---

[3] The *Pietrowski* Petitioners also assert, without explanation or support, that Petitioners "seek review of an interlocutory order, rather than a final judgment." (*Pietrowski* BIO at 16.) Even if that assertion were true (and it is not), it would compel summary reversal on the ground that the Second Circuit lacked appellate jurisdiction over the appeal in *Frommert II*. *E.g.*, *Almonte* v. *City of Long Beach*, 478 F.3d 100, 106 (2d Cir. 2007).

Administrator made its original benefits determination. The Plan Administrator originally construed the Plan in light of the "phantom account" offset provision that the Second Circuit later found was not properly disclosed and added to the Plan until 1998. (Pet. 6; Pet. App. 42a.) On remand, the Plan Administrator therefore offered an interpretation of the meaning of the Plan *without* that provision. (Pet. 8-9.) The Plan Administrator did so based on the Second Circuit's holding that the task on remand was to calculate the benefits due to Respondents in light of "the pre-amendment terms of the Plan" – *i.e.*, the terms of the plan without reference to the "phantom account" offset. (Pet App. 51a.)

To be sure, the text that appears on the printed pages of the Plan document did not change between the Plan Administrator's original interpretation and the interpretation offered on remand from *Frommert I*. In that sense, it is true that the Plan Administrator construed "the same [Plan] terms" on remand that were construed in the original benefits determination. (*Pietrowski* BIO at 8 (quoting Pet. App. 13a).) Only on remand, however, was the Plan Administrator on notice that the "phantom account" offset was null and void as applied to Respondents. Thus, only on remand did the Plan Administrator construe the terms of the Plan without reference to that offset.

Respondents therefore miss the mark in asserting that the Second Circuit opinion stands only for the proposition that a plan administrator cannot offer two different interpretations of precisely the same

plan terms. No district court will read the opinion that way, because those were plainly not the facts of the case. The Second Circuit instead held that no deference was due to the Plan Administrator's interpretation "because the plan administrator never rendered any *decision* other than the original benefit determinations, all of which were premised on the now-impermissible 'phantom account' offset mechanism." (Pet. App. 13a (emphasis added).)[4]

It is precisely this holding – that no deference is due to an interpretation of a plan that does not rise to the level of an actual "decision" on a benefits claim – that conflicts with Supreme Court and Circuit authority. (Pet. at 12-22.) That holding also subjects the nation's ERISA plans to great uncertainty about how those plans will be interpreted. (*Id.* at 25-26.) For these reasons, the Court should grant plenary review of the first question presented or, at a minimum, should remand for reconsideration in light of the recent decision in *Glenn*.

Second, even as construed by the *Pietrowski* Respondents, the Second Circuit decision is worthy of this Court's review. According to Respondents, the Second Circuit decision stands for the proposition that "once an ERISA plan administrator's original

---

[4] The fact that the Second Circuit went on to remark, in a passing statement discussing the extent of other authority on this question, that "the same terms" of the Plan had been construed earlier (Pet. App. 13a), does not obscure the force or scope of the court's actual holding that there was no "decision" of the Plan Administrator that could be accorded *Firestone* deference.

interpretation of plan language is rejected, any 'secondary' interpretation advanced by the administrator is no[t] an exercise of discretion entitled to deference" but "*merely a litigation position*." (*Pietrowski* Pet. at 10 n.3.) This one-bite-at-the-apple principle itself conflicts with decisions of this Court and other Circuits.

The Seventh Circuit has squarely held that, if an issue of plan interpretation "did not ripen into an 'apple' ready to be bitten" until after an initial court ruling, courts must seek the views of the plan administrator following that ruling. *Pakovich* v. *Broadspire Servs., Inc.*, 535 F.3d 601, 606 (7th Cir. 2008); *accord Gallo* v. *Amoco Corp.*, 102 F.3d 918, 923 (7th Cir. 1996) (Posner, C.J.). Similarly, in *Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353, 1354 (11th Cir. 2008), the Eleventh Circuit expressly required a district court to defer to a plan administrator's interpretation of plan terms on remand, notwithstanding its determination that the administrator's denial of benefits under the plan had been arbitrary and capricious. These decisions directly conflict with the one-bite-at-the-apple principle that Respondents attribute both to the Second Circuit in the decision below and to the Ninth Circuit in *Grosz-Salomon* v. *Paul Revere Life Insurance Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001). (*Pietrowski* BIO at 9-10.) Indeed, the *Pietrowski* Respondents do not bother to deny that their reading of the Second Circuit's decision creates a conflict with *Pakovich* and *Oliver*.

Respondents' reading of the Second Circuit decision also places that decision at odds with this

Court's decisions in *Firestone* and *Glenn*. According to Respondents, an interpretation of a plan first offered in litigation deserves no *Firestone* deference, presumably because such an interpretation might be tainted by a conflict of interest. (*Pietrowski* BIO at 9, 10 n.3.) But *Glenn* holds that even a direct conflict of interest on the part of a plan administrator does not justify *de novo* review of the plan administrator's interpretation of an ERISA plan. (Pet. 19-21.)

Moreover, *Firestone* and *Glenn* hold that a plan administrator is entitled to deference *based on the authority provided to the plan administrator in the plan documents*. (*Id.* at 17-19.) Here, the Plan documents do not limit the Plan Administrator's authority to interpretations rendered outside of litigation; nor do they limit the Plan Administrator to a "single bite at the apple." (Pet. App. 142a.) The Second Circuit thus refused to accord *Firestone* deference to the Plan Administrator *for reasons having nothing to do with the grant of authority in the Plan* – in direct contravention of *Firestone* and *Glenn*.

C. Petitioners Did Not Waive The First Question.

Both sets of Respondents assert that Petitioners waived any argument that the District Court should have remanded the case to the Plan Administrator for an interpretation of the pre-amendment terms of the Plan. (*Pietrowski* BIO at 17; *Frommert* BIO at 22.) This argument is a red herring: Petitioners do not argue that there should have been a remand to the Plan Administrator.

In the wake of *Frommert I*, the Plan Administrator provided the District Court with a considered interpretation of the pre-amendment terms of the Plan. (*E.g.*, Pet. App. 144a.) In fact, the Second Circuit was persuaded that the Plan Administrator had placed his views before the District Court so thoroughly that "nothing" would have been gained by remanding to the Plan Administrator for further proceedings. (*Id.* at 11a.) Accordingly, Petitioners are not arguing that there should have been a remand to the Plan Administrator. Petitioners argue instead that the courts below should have deferred to the interpretation of the Plan Administrator that was admittedly presented to the District Court.

II. REVIEW SHOULD BE GRANTED ON THE SECOND QUESTION.

The Second Circuit compounded its error of refusing to accord *Firestone* deference to the Plan Administrator by improperly deferring to the District Court's so-called "allowable discretion" to interpret the Plan on remand. (Pet. 29-33.) Under settled law, district courts do not have any "allowable discretion" regarding the interpretation of ERISA plans; they are obliged to read such plans *correctly*. (*Id.*) The Second Circuit's contrary holding exposes plan administrators to the alarming prospect that different district courts will exercise their "allowable discretion" to adopt different interpretations of the very same ERISA plan. (*Id.* at 33-34.)

Respondents counter that an "allowable discretion" standard of review was proper because

the district court was crafting a remedy rather than engaging in an ordinary act of plan interpretation. (*Frommert* BIO at 12; *Pietrowski* BIO at 10.) This argument goes astray by assigning talismanic significance to the Second Circuit's statement that the task of the District Court on remand was to "fashion[] the appropriate remedy." (Pet App. at 51a.) While it is obviously true that the District court had to fashion a remedy on remand, it is equally true that, in order to fashion that remedy, the District Court was required to determine "how prior distributions were to be treated" under "the pre-amendment terms of the Plan." (*Id.*) The fact that the District Court was tasked with awarding a remedy does not insulate from appellate review the interpretation of the Plan that underlies that remedy.

Petitioners acknowledge the authority holding that district courts have discretion to craft equitable remedies under ERISA. None of those decisions, however, holds that an act of *plan interpretation* falls within the scope of that equitable discretion. For example, the First Circuit decision cited by the *Pietrowski* Respondents (at 10-11) did not involve plan interpretation; rather, the district court in that case determined that the plan administrator's factual findings were "without any record evidence supporting the termination" of a participant's benefits. *Cook* v. *Liberty Life Ins. Co.*, 320 F.3d 11, 18 (1st Cir. 2003). Only under those circumstances did the First Circuit review a decision to award retroactive benefits under an abuse of discretion standard. *Id.* at 23-24.

Similarly, in *Grosz-Salomon*, the Ninth Circuit reviewed for abuse of discretion a district court's decision to award retroactive benefits after rejecting a plan administrator's factual findings as arbitrary and capricious. 237 F.3d at 1162-63. That case, too, did not involve a dispute over plan terms. Indeed, the Ninth Circuit expressly acknowledged that the case might have been different had the plan administrator "misconstrue[d]" the plan or "appl[ied] the wrong standard" in evaluating the participant's benefits claim. *Id.* at 1163. Thus, neither case supports the Second Circuit's application of the "allowable discretion" standard of review to a district court's interpretation of plan terms.

The holding of the Second Circuit – that district courts have "allowable discretion" in interpreting plans during the course of remedying an ERISA violation – is inconsistent with settled law. That holding, if allowed to stand, will seriously disrupt the administration of ERISA plans by exposing such plans to conflicting interpretations by different district courts. Plenary review (or summary reversal) of the decision below is therefore warranted.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL D. RYAN
XEROX CORPORATION
45 Glover Avenue
Norwalk, CT 06856

MARGARET A. CLEMENS
NIXON PEABODY LLP
Clinton Square
P.O. Box 31051
Rochester, NY 14603

ROBERT D. WICK
Counsel of Record
RICHARD C. SHEA
ROBERT S. NEWMAN
CHRISTIAN J. PISTILLI
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

Counsel for Petitioners

February 2009

AMICUS CURIAE BRIEF

SUPREME COURT, U.S.
FILED
MAY 20 2009
OFFICE OF THE CLERK

Nos. 08-803, 08-810 and 08-826

In the Supreme Court of the United States

MATTHEW D. ALFIERI, ET AL., PETITIONERS

v.

SALLY L. CONKRIGHT, ET AL.

SALLY L. CONKRIGHT, ET AL., PETITIONERS

v.

PAUL J. FROMMERT, ET AL.

KENNETH PIETROWSKI, ET AL., PETITIONERS

v.

SALLY L. CONKRIGHT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

CAROL A. DE DEO
Deputy Solicitor for National Operations
TIMOTHY D. HAUSER
Associate Solicitor
ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether the court of appeals applied correct standards of review in this denial-of-benefits case under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, when it concluded that:

   (a) the administrator of an ERISA plan whose denial of benefits violated ERISA was not entitled to deference regarding its opinion on how to remedy the violation, and

   (b) the district court's choice of remedy should be reviewed for abuse of discretion.

2. Whether the court of appeals applied correct legal principles in holding that employees who signed general releases knowingly and voluntarily waived their claims under ERISA.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Discussion 8
A. The issues in No. 08-810 do not warrant this Court's review 9
B. The issues in Nos. 08-826 and 08-803 do not warrant this Court's review 18
Conclusion 22

TABLE OF AUTHORITIES

Cases:

Administration Comm. of Wal-Mart Assoc. Health & Welfare Plan v. *Willard*, 393 F.3d 1119 (10th Cir. 2004) 15
Barrett v. *Safeway Stores, Inc.*, 538 F.2d 1311, 1313 (8th Cir. 1976) 17
Burkhart Grob Luft und Raumfahrt GmbH & Co. KG v. *E-Systems, Inc.*, 257 F.3d 461 (5th Cir. 2001) 13
Canseco v. *Construction Laborers Pension Trust*, 93 F.3d 600 (9th Cir 1996), cert. denied, 520 U.S. 1118 (1997) 12
Central States, Se. & Sw. Areas Pension Fund v. *Central Transp., Inc.*, 472 U.S. 559 (1985) 15
Chaplin v. *NationsCredit Corp.*, 307 F.3d 368 (5th Cir. 2002) 20
Colton v. *Colton*, 127 U.S. 300 (1888) 11
Cook v. *Liberty Life Assurance Co.*, 320 F.3d 11 (1st Cir. 2003) 12, 13

Cases—Continued: Page

Downie v. *Independent Drivers Ass'n Pension Plan*, 934 F.2d 1168 (10th Cir. 1991) 13
Eddy v. *Prudence Bonds Corp.*, 165 F.2d 157 (2d Cir. 1947), cert. denied, 333 U.S. 845 (1948) 17
Emor, Inc. v. *Cyprus Mines Corp.*, 467 F.2d 770 (3d Cir. 1972) 17
FDIC v. *Brants*, 2 F.3d 147 (5th Cir. 1993) 17
Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989) 10
Gallo v. *Amoco Corp.*, 102 F.3d 918 (7th Cir. 1996), cert. denied, 521 U.S. 1129 (1997) 17
Groesz-Salomon v. *Paul Revere Life Ins. Co.*, 237 F.3d 1154 (9th Cir. 2001) 12
Halpin v. *WW. Grainger, Inc.*, 962 F.2d 685 (7th Cir. 1992) 12
Harte v. *Bethlehem Steel Corp.*, 214 F.3d 446 (3d Cir.), cert. denied, 531 U.S. 1037 (2000) 15
Hunter v. *Caliber Sys., Inc.*, 220 F.3d 702 (6th Cir. 2000) 15
Kennedy v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009) 21
Layaou v. *Xerox Corp.*, 238 F.3d 205 (2d Cir. 2001) 4
Leavitt v. *Northwestern Bell Tel. Co.*, 921 F.2d 160 (8th Cir. 1990) 18
Madrid v. *Phelps Dodge Corp.*, 211 Fed. Appx. 676 (10th Cir. 2006) 20
Metropolitan Life Ins. Co. v. *Glenn*, 128 S. Ct. 2343 (2008) 10

Cases—Continued: Page

Miller v. *Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006), cert. denied, 549 U.S. 1280 (2007) 13

Moench v. *Robertson*, 62 F.3d 553 (3d Cir. 1995), cert. denied, 516 U.S. 1115 (1996) 15

NLRB v. *Hobart Bros. Co.*, 372 F.2d 203 (6th Cir. 1967) 17

Pakovich v. *Broadspire Servs., Inc.*, 535 F.3d 601 (7th Cir. 2008) 16

Oliver v. *Coca-Cola Co.*, 546 F.3d 1353 (2008) 15, 16

Oubre v. *Entergy Operations, Inc.*, 522 U.S. 422 (1998) 20

Smart v. *Gillette Co. Long-Term Disability Plan*, 70 F.3d 173 (1st Cir. 1995) 18, 20

United States v. *Andrews*, 530 F.3d 1232 (10th Cir. 2008) 13

Welsh v. *Burlington N., Inc., Employee Benefits Plan*, 54 F.3d 1331 (8th Cir. 1995) 17, 18

White v. *Coca-Cola Co.*, 542 F.3d 848 (11th Cir. 2008), cert. denied, No. 08-991 (Apr. 6, 2009) 16

Worthy v. *New Orleans S.S. Ass'n*, 342 F.3d 422 (5th Cir. 2003) 15

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 6

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 2

29 U.S.C. 1022(a) 2

29 U.S.C. 1022(b) 2

Statutes—Continued: Page

29 U.S.C. 1054(g) 2, 4
29 U.S.C. 1054(h) 2, 4
29 U.S.C. 1104(a)(1)(D) 21
29 U.S.C. 1132(a)(1)(B) (§ 502(a)(1)(B)) 3, 10
29 U.S.C. 1132(a)(3) (§ 502(a)(3)) 3
Older Workers Benefit Protection Act, 29 U.S.C. 626 (f)(1) 6, 20
Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.* 18

Miscellaneous:

George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees* (rev. 2d ed. 1980) 11
Restatement (Second) of Trusts (1959) 11
2 Restatement (Third) of Trusts (2003) 11
3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* (4th ed. 1988) 11

In the Supreme Court of the United States

No. 08-803

MATTHEW D. ALFIERI, ET AL., PETITIONERS

v.

SALLY L. CONKRIGHT, ET AL.

No. 08-810

SALLY L. CONKRIGHT, ET AL., PETITIONERS

v.

PAUL J. FROMMERT, ET AL.

No. 08-826

KENNETH PIETROWSKI, ET AL., PETITIONERS

v.

SALLY L. CONKRIGHT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions for a writ of certiorari should be denied.

STATEMENT

1. Under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, the administrator of an employee benefit plan must give plan participants a summary plan description (SPD) that "shall be sufficiently accurate and comprehensive to reasonably apprise [them] of their rights and obligations under the plan." 29 U.S.C. 1022(a). The SPD must provide notice of, among other things, "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. 1022(b). ERISA also generally requires the administrator of a pension plan to give participants prior written notice of any plan amendment that significantly reduces the rate of future benefit accrual. 29 U.S.C. 1054(h). And ERISA's anti-cutback provision prohibits amendments that decrease benefits that have already accrued. 29 U.S.C. 1054(g).

2. This case was brought by employees of Xerox Corporation who are participants in the Xerox Corporation Retirement Income Guarantee Plan (the Plan), an ERISA-covered pension plan that is a petitioner in No. 08-810. Pet. App. 24a-25a.[1] The employees were rehired by Xerox after previously leaving the company and receiving lump-sum distributions of pension benefits that they had accrued before their departures. *Id.* at 25a. The employees claim that the Plan and its administrators (the other petitioners in No. 08-810) violated ERISA by using a "phantom account" method to calculate the amount by which the employees' current pension benefits are offset to reflect their prior distributions. *Id.* at 75a. In essence, the phantom account

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix in No. 08-810.

method reduces an employee's current benefits to reflect not only the actual amount of the prior distribution, but also hypothetical investment gains that the distribution would have earned if it had remained in the employee's pension account and been invested. *Id.* at 5a.

The employees sued the Plan and its administrators under ERISA Section 502(a)(1)(B) and (3), 29 U.S.C. 1132(a)(1)(B) and (3). The employees argued that, until the Plan and the SPD were amended in 1998, the Plan did not provide for use of the phantom account method to calculate the offset for the distributions they previously received, and that the SPD did not disclose that the phantom account method would be used. Pet. App. 75a, 81a-82a. The employees contended that the Plan and its administrators had therefore violated ERISA's SPD, notice, and anti-cutback provisions. *Id.* at 75a-76a.

The district court granted summary judgment in favor of the Plan and its administrators. Pet. App. 61a-98a. As relevant here, the court accepted their argument that "the Plan has always provided for the challenged offset" and that the 1998 amendments only made express what the pre-1998 plan terms implicitly provided. *Id.* at 75a; see *id.* at 79a-93a.

3. The court of appeals vacated the district court's decision in relevant part. Pet. App. 22a-60a. The court of appeals found that, although the Plan has always contained a non-duplication provision stating that benefits will be offset by prior distributions, *id.* at 26a-28a, until 1998, the Plan did not address how to calculate the offset for the distributions received by the plaintiff employees. See *id.* at 28a-29a ("[T]he 1989 Restatement" of the Plan "did not specify how the Plan would account for the prior distributions."); *id.* at 37a ("Not until 1998, when the phantom account was fully explained in an SPD, was

the text of the Plan amended and adequate information provided to former Xerox employees concerning the treatment of their previous distributions."). The court observed that it had already held, in *Layaou* v. *Xerox Corp.*, 238 F.3d 205, 209-212 (2d Cir. 2001), that earlier versions of the Plan violated ERISA's SPD requirement by failing to "provide notice" that participants' "future benefits would be offset by an appreciated value of their prior lump-sum benefits distributions." Pet. App. 43a-44a (quoting *Layaou*, 238 F.3d at 210). Accordingly, the court held "that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable," even under "an arbitrary and capricious standard" of review. *Id.* at 44a. The court further held that the Plan's efforts to apply the phantom account method before issuance of the 1998 SPD violated the requirement in Section 1054(h) that plans provide advance notice of amendments that significantly reduce the rate of future benefit accrual, *id.* at 49a, and that application of the phantom account method to employees rehired before 1998 impermissibly reduced accrued benefits in violation of Section 1054(g), *id.* at 50a.

The court of appeals remanded the case for the district court to craft a remedy for those ERISA violations, "utiliz[ing] an appropriate pre-amendment calculation to determine [employees'] benefits." Pet. App. 51a. Noting "the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated," the court of appeals suggested that the district court "employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." *Ibid.*

4. On remand, the district court determined that the plaintiff employees' benefits should be calculated by

subtracting the actual amount of prior distributions without adjustment for hypothetical investment gains or losses. Pet. App. 102a-108a. Noting that the pre-1998 plan terms said "virtually nothing" about how to account for prior distributions, *id.* at 104a, the court reasoned that deducting the actual amount of the distributions is straightforward, adequately prevents employees from receiving a windfall, and "most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD." *Id.* at 107a. The court rejected testimony that "focused on the appropriate economic, financial and actuarial methods for treating prior distributions," stating that "[i]f the employee had no notice of the 'phantom account,' he also had no notice of some of the other mechanisms suggested by witnesses at the remand hearing." *Id.* at 104a.

The district court also concluded that 22 of the plaintiff employees, 18 of whom are petitioners in Nos. 08-803 and 08-826, were entitled to relief even though they had signed general releases when their employment was terminated through reductions in force that occurred during the litigation. Pet. App. 109a-121a.[2] The court reasoned that plan participants may waive ERISA claims, but a waiver must be knowing and voluntary and is subject to closer scrutiny than a waiver of general contract claims. *Id.* at 112a-113a. Applying a "totality of the circumstances" test previously adopted by the court of appeals, the district court concluded that although some considerations weighed in favor of uphold-

[2] The four release signers who are not petitioners in Nos. 08-803 or 08-826 altered their releases to exclude their claims in this litigation, and the Plan and its administrators conceded that their claims are not barred. Pet. App. 14a n.4, 111a.

ing the releases, they should not be given effect because of deficiencies in the "clarity of the release[s] and the consideration given by Xerox in exchange for the releases." *Id.* at 113a-114a (citation omitted).

In particular, the district court found that the releases were ambiguous because although they stated that they covered "any and all claims," including ERISA claims, they also stated that the consideration for the releases was "in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." Pet. App. 114a (citation omitted). The court concluded that the latter language could be read to preserve the employees' rights to pension benefits calculated without a "phantom account" reduction because the court of appeals had held that the employees were "entitled by law" to those unreduced benefits. *Id.* at 115a-116a. The district court also stated that the failure of the releases to comply with requirements in the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. 626(f)(1), which governs waivers of claims under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, was "some evidence" that the waivers were not knowing and voluntary. Pet. App. 116a n.5.

5. The court of appeals upheld the district court's choice of a remedy for the ERISA violations, but vacated the district court's holding that the releases were unenforceable. Pet. App. 1a-21a.

The court of appeals reviewed the district court's choice of remedy for abuse of discretion. Pet. App. 8a. The court of appeals concluded that the Plan and its administrators had failed to establish that the district court's approach "violated either the Plan terms or any law." *Id.* at 9a. The court also rejected their arguments that the district court erred by not adopting an approach

that would have treated the plaintiffs as newly hired employees, by not remanding the remedy issue to the plan administrator, and by failing to defer to the administrator's approach. *Id.* at 9a-14a.

In addressing the deference due the administrator's approach, the court of appeals recognized that where an ERISA plan gives the administrator discretionary authority to construe plan terms, a district court should review the administrator's decision "under an excess of allowable discretion standard." Pet. App. 12a. The court of appeals concluded, however, that the deference principle did not apply to the remedial determination in this case because the district court had no "decision" to review. *Id.* at 13a. The court of appeals explained that the Plan and its administrators had identified "no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and [the court] found such a construction to have violated ERISA." *Ibid.* Because the Plan "addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence," the court saw "no problem with the District Court's selection of one reasonable approach among several reasonable alternatives." *Id.* at 13a-14a.

Turning to the releases signed by the petitioners in Nos. 08-803 and 08-826, the court of appeals held that the releases were enforceable. Pet. App. 14a-21a. It rejected the district court's view that the releases were ambiguous, explaining that the district court had "conflated the existence of consideration adequate to render a release enforceable with the scope of claims thereby released." *Id.* at 18a. The court of appeals concluded

that the language in which the district court had found ambiguity (see p. 6, *supra*) "provided only that the consideration for the release[s], *i.e.*, the salary continuance[s], did not replace any benefits, including pension benefits, to which the employee[s] w[ere] already entitled." Pet. App. 19a. Noting that the employees had not alleged that Xerox had violated that provision by denying them pension benefits based on the salary continuances, the court concluded that uncertainty over the amount of benefits when the releases were signed did not render them unenforceable. *Id.* at 19a-20a.

The court of appeals then applied the "totality of the circumstances" test articulated in circuit precedent and, based on "the undisputed facts," determined that the releases were knowing and voluntary. Pet. App. 20a-21a. The court stated that it need not decide whether the releases complied with the OWBPA because that statute is irrelevant to ERISA claims. *Id.* at 18a n.5.

DISCUSSION

The court of appeals correctly upheld the district court's choice of remedy for the ERISA violations committed by the petitioners in No. 08-810 (the Xerox petitioners), and the court of appeals' rulings on the remedy issue do not conflict with any decision of this Court or another court of appeals. This Court's review of the uestions presented in No. 08-810 is therefore not warranted. Nor is review warranted of the court of appeals' holding that the petitioners in Nos. 08-803 and 08-826 (the release petitioners) validly released their ERISA claims. Contrary to the release petitioners' contentions, the court of appeals did not adopt a new standard for assessing the enforceability of releases of ERISA claims, reject the applicability of common law principles

in ERISA cases, or erroneously fail to apply OWBPA standards. And the court's decision on the release issue is consistent with decisions of this Court and other courts of appeals. Accordingly, this Court should deny all three petitions for a writ of certiorari.

A. The Issues In No. 08-810 Do Not Warrant This Court's Review

1. a. Contrary to the contentions of the Xerox petitioners (Pet. 11-12, 17-22), the court of appeals correctly held that the district court was not required to defer to the plan administrator's views on the appropriate remedy for the ERISA violations committed by the administrator and the Plan. When the district court crafted that remedy, the court of appeals had already concluded that the pre-1998 Plan (including its non-duplication-of-benefits provision) did not address how to calculate the amount by which the plaintiff employees' benefits should be offset to account for their prior distributions. Pet. App. 28a-29a, 37a. The court of appeals had also already held that the Plan's failure to specify an offset method and the administrator's efforts to impose the phantom account method violated ERISA's SPD and notice requirements, *id.* at 43a-51a, and that the administrator had arbitrarily and capriciously interpreted the pre-1998 plan terms to incorporate the phantom account method, *id.* at 44a. See pp. 3-4, *supra*. In those circumstances, the district court had no obligation to defer to the administrator's newly-minted assertion that the same pre-1998 plan terms provided for a different offset method. On the contrary, because the court of appeals had determined that the plan terms were silent on the appropriate offset method, the district court had discretion to select a reasonable method in the exercise of

its discretion to craft an appropriate remedy for the ERISA violations. See Pet. App. 12a-14a.[3]

In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989) (*Firestone*), this Court held that courts should be "guided by principles of trust law" when they "determin[e] the appropriate standard of review" for decisions in actions, like this one, challenging benefits determinations under 29 U.S.C. 1132(a)(1)(B). Based on trust principles, the Court further held that a benefits decision by a plan administrator is reviewed de novo, unless the administrator is exercising discretion conferred by the plan to determine eligibility for benefits or to construe the plan terms, in which case abuse-of-discretion review applies. *Firestone*, 489 U.S. at 111-115. In *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008), this Court reaffirmed *Firestone*'s approach, relying on trust law in concluding that a reviewing court should consider an administrator's conflict of interest as one "of several different, often case-specific, factors" that are "weigh[ed] all together" to determine the lawfulness of the administrator's action. *Id.* at 2351 (citing,

[3] The district court's decision not to defer to the administrator's proposed offset method was particularly reasonable given that this method was only one of two alternative approaches that the Xerox petitioners advanced on remand. See 08-810 Pet. C.A. Br. 6, 16, 33-36 (discussing alternative "new hire" approach); C.A. App. A113 (same). The Xerox petitioners' contention that the court erred in declining to defer to the plan administrator's method thus cannot be reconciled with their own advocacy of a different method. Moreover, the Xerox petitioners did not clearly and timely ask the district court to defer. Compare 08-810 Pet. Pre-Hearing Br. Addressed to Remedies (failing to ask for deference) and C.A. App. A389, A395 (appearing to agree with district court that deference not warranted) with 08-810 Pet. Pre-Hearing Reply Br. Addressing Remedies 2 (asking for deference).

inter alia, Restatement (Second) of Trusts § 187 cmt. d at 403 (1959) (Second Restatement)).

The court below acted consistently with trust law in holding that the district court was not required to defer to the plan administrator's preferred approach to the offset issue when crafting a remedy for the administrator's ERISA violations. Even where a trustee has discretion to determine the benefits of a trust beneficiary, a "court will control the trustee in the exercise of [that] power" if the trustee makes an "arbitrary decision" or acts "beyond the bounds of a reasonable judgment." Second Restatement § 187 cmts. h and i; see 2 Restatement (Third) of Trusts § 50 & cmt. b (2003) (Third Restatement); 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 187, 187.2, 187.3 (4th ed. 1988) (Scott). "Where the court finds that there has been [such] an abuse of a discretionary power, the decree to be rendered is in its discretion." George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees* § 560, at 222 (rev. 2d ed. 1980) (Bogert). In exercising that discretion, the court may, if the circumstances warrant, make its own judgment about the benefits due and order payment by the trustee. See *id.* at 223. Thus, the court may, in appropriate circumstances, "itself fix the amount" that the trustee shall pay rather than defer to the trustee to determine a reasonable amount. Scott § 187.1, at 28; see Third Restatement § 50 cmt. b at 261; Bogert § 560, at 223 n.19 (giving examples); see, *e.g.*, *Colton* v. *Colton*, 127 U.S. 300, 322 (1888).

In accord with these principles and the decision below, other courts of appeals have held that "[o]nce a court finds that an administrator has acted arbitrarily and capriciously in denying a claim for benefits, the court can either remand the case to the administrator

for a renewed evaluation of the claimant's case, or it can award a retroactive reinstatement of benefits." *Cook* v. *Liberty Life Assurance Co.*, 320 F.3d 11, 24 (1st Cir. 2003). See, *e.g.*, *Halpin* v. *WW. Grainger, Inc.*, 962 F.2d 685, 697 (7th Cir. 1992). "[T]he principle of ERISA deference does not deprive a court of its discretion to formulate a necessary remedy when it determines that the plan has acted inappropriately." *Cook*, 320 F.3d at 24. Thus, a court is not required in all cases to allow the administrator a second opportunity to determine the appropriate level of benefits when the court has determined that the administrator acted arbitrarily in construing plan language. See, *e.g.*, *Canseco* v. *Construction Laborers Pension Trust*, 93 F.3d 600, 609 (9th Cir. 1996), cert. denied, 520 U.S. 1118 (1997). Reconsideration by the administrator may be appropriate in some cases where the administrator simply failed adequately to explain its reasoning or where the correct determination of benefits will depend on the construction of plan language that actually addresses the issue but is ambiguous. See *Grosz-Salomon* v. *Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001). Here, however, the administrator's initial interpretation had already been found unreasonable and in violation of ERISA, and a correct determination did not depend on construing ambiguous plan terms because the plan said "virtually nothing" about how to calculate an offset. Pet. App. 104a.

b. For similar reasons, the Xerox petitioners are also incorrect in asserting (Pet. 28-33) that the court of appeals applied the wrong standard in reviewing the district court's choice of remedy. Because a district court has discretion to fashion the appropriate remedy when a trustee has abused his authority, a court of appeals should review the district court's choice of remedy in

such circumstances for abuse of discretion. That approach accords with principles of trust law, under which courts of appeals review a district court's choice of equitable remedies for abuse of discretion. See *United States* v. *Andrews*, 530 F.3d 1232, 1238 (10th Cir. 2008); *Burkhart Grob Luft und Raumfahrt GmbH & Co. KG* v. *E-Systems, Inc.*, 257 F.3d 461, 469 (5th Cir. 2001). And it is consistent with the case law under ERISA. See, *e.g.*, *Cook*, 320 F.3d at 24 ("An appellate court reviews a district court's choice of remedy for an ERISA violation for abuse of discretion."); *Downie* v. *Independent Drivers Ass'n Pension Plan*, 934 F.2d 1168, 1170 (10th Cir. 1991) (same).

Contrary to the Xerox petitioners' contention (Pet. 28), application of abuse-of-discretion review in this case does not conflict with the rule that judicial review of interpretations of written instruments is generally de novo. Nor does applying abuse-of-discretion review here authorize district courts to adopt conflicting interpretations of the same plan language. Pet. 33. As discussed above, the district court was not interpreting plan terms when it fashioned the remedy here, because the Plan was silent about how to calculate the offset for the prior distributions. See pp. 3-4, 9, 12, *supra*; Pet. App. 13a, 28a-29a, 37a, 104a.[4]

[4] The Xerox petitioners are mistaken in asserting (Pet. 26-27) that *Miller* v. *Xerox Corp. Retirement Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006), cert. denied, 549 U.S. 1280 (2007), required the plan administrator to use the offset method that the administrator advocated on remand in this case. The Ninth Circuit in *Miller* held that using the phantom account method to offset benefits violated ERISA because it reduced pension benefits by more than the accrued benefit attributable to earlier distributions. *Id.* at 872, 874. Although the court stated that "the offset *permitted*" was "one based on the actual actuarial equivalent" of the prior distribution, *id.* at 876 (emphasis added), the court did

2. a. The Xerox petitioners err in contending (Pet. 12, 17-22) that the decision below conflicts with this Court's decisions in *Firestone* and *Glenn*. That contention is based on the incorrect premise that the court of appeals held "that no deference is due to a plan administrator's interpretation of plan language when the administrator interprets the plan outside of the plan's administrative claims process." *Id.* at 12. The court made no such holding. Instead, the court held that deference to the administrator's opinion on the appropriate offset method was not required because "the administrator had previously construed the same terms" and the court had "found such a construction to have violated ERISA." Pet. App. 13a. Moreover, the court of appeals had already determined that those terms did not address the offset method. *Id.* at 13a, 28a-29a, 37a. Neither *Firestone* nor *Glenn* addresses whether a plan administrator is due deference when the administrator proposes a new interpretation of plan terms that the administrator previously construed arbitrarily and capriciously and in violation of ERISA. Nor do they address whether deference is due when a court has already determined that the plan terms do not speak to the relevant issue.

b. For similar reasons, the Xerox petitioners are incorrect in contending (Pet. 12-17) that the court of ap-

---

not *require* the plan to offset benefits by an actuarial equivalent rather than only the actual amount of the prior distributions, much less require use of the particular actuarial equivalent proposed by the administrator on remand in this case. Nor did the court in *Miller* consider whether the ERISA violations found in this case, including the SPD and notice violations, might weigh against adoption of an offset based on any amount greater than the actual amount of prior distributions. See Pet. App. 104a (district court's conclusion that "[i]f the employee had no notice of the 'phantom account,' he also had no notice of some of the other mechanisms suggested by witnesses at the remand hearing").

peals' deference ruling conflicts with decisions of other courts of appeals. Most of the cases cited by the Xerox petitioners involve the application by courts of appeals of deferential review to a plan administrator's interpretation of plan provisions even though that interpretation was not expressed through a decision on a benefits claim. See *Administrative Comm. of Wal-Mart Assoc. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1123 (10th Cir. 2004); *Worthy* v. *New Orleans S.S. Ass'n*, 342 F.3d 422, 427-428 (5th Cir. 2003); *Hunter* v. *Caliber Sys., Inc.*, 220 F.3d 702, 711 (6th Cir. 2000); *Harte* v. *Bethlehem Steel Corp.*, 214 F.3d 446, 448 (3d Cir.), cert. denied, 531 U.S. 1037 (2000); *Moench* v. *Robertson*, 62 F.3d 553, 566-567 (3d Cir. 1995), cert. denied, 516 U.S. 1115 (1996); see also *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 568 (1985). Because the decision below does not hold that a plan administrator receives deference only for an interpretation expressed through a decision on a benefits claim, it does not conflict with those decisions. In addition, unlike the decision below, the decisions from the other circuits do not involve an administrator's second attempt to apply plan provisions after a court has rejected its previous interpretation as arbitrary and capricious and in violation of ERISA and has determined that the plan terms are silent on the relevant issue.

The other cases on which the Xerox petitioners base their claim of a conflict likewise do not involve these circumstances. In *Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353, 1353-1354 (2008), the Eleventh Circuit held that a plan administrator had erroneously determined that a participant was not entitled to disability benefits. The court remanded the case to the district court for calcula-

tion of the benefits due, with instructions to allow the plan administrator to offer an interpretation of a plan term providing for plan benefits to be offset by Social Security benefits and to review the administrator's interpretation under the deferential standard articulated in *Glenn*. *Oliver* is consistent with the decision below because, when the Eleventh Circuit remanded *Oliver*, it had neither rejected the administrator's interpretation of the relevant plan provision nor determined that the provision was silent on the relevant issue. On the contrary, the Eleventh Circuit had held in a related case that the administrator's construction of the provision was reasonable. See *ibid.* (citing *White* v. *Coca-Cola Co.*, 542 F.3d 848, 853-857 (11th Cir. 2008), cert. denied, No. 08-991 (Apr. 6, 2009)).

The decision below is likewise consistent with *Pakovich* v. *Broadspire Services, Inc.*, 535 F.3d 601 (7th Cir. 2008). In *Pakovich*, a plan administrator denied a claim for disability benefits on the ground that a claimant was not totally disabled from her own occupation, as required to obtain benefits for 24 months, without deciding whether she was unable to work at any occupation, as required to obtain benefits beyond 24 months. *Id.* at 602. The district court reversed the "own occupation" determination but went on to find that the claimant was not disabled from all occupations and therefore was not entitled to benefits beyond 24 months. *Ibid.* The court of appeals held that because the plan administrator had not addressed the "all occupations" issue, the matter should have been remanded to the administrator to address that issue in the first instance. *Id.* at 602, 607. That holding is consistent with the decision below because, in *Pakovich*, the administrator had not previously interpreted the relevant plan provisions and the court

had neither already rejected the administrator's interpretation nor determined that the provisions did not address the relevant issue.[5]

3. The Xerox petitioners are also mistaken in contending (Pet. 29-32) that the court of appeals created a circuit conflict by reviewing the district court's choice of remedy for abuse of discretion. All but one of the cases on which the Xerox petitioners rely are non-ERISA decisions applying de novo review to interpretations of written documents. *FDIC* v. *Brants*, 2 F.3d 147, 150 (5th Cir. 1993); *Barrett* v. *Safeway Stores, Inc.*, 538 F.2d 1311, 1313 (8th Cir. 1976); *Emor, Inc.* v. *Cyprus Mines Corp.*, 467 F.2d 770, 773 (3d Cir. 1972); *NLRB* v. *Hobart Bros. Co.*, 372 F.2d 203, 206 (6th Cir. 1967); *Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157, 163 (2d Cir. 1947), cert. denied, 333 U.S. 845 (1948). None addressed the appropriate standard for reviewing a district court's choice of remedy for an ERISA violation. The only ERISA case cited by the Xerox petitioners, *Welsh* v. *Burlington Northern, Inc., Employee Benefits Plan*, 54 F.3d 1331 (8th Cir. 1995), also did not discuss what standard applies to review of a district court's choice of

[5] The decision below is also consistent with *Gallo* v. *Amoco Corp.*, 102 F.3d 918 (7th Cir. 1996), cert. denied, 521 U.S. 1129 (1997) (see Pet. 23-24 n.8). In *Gallo*, the Seventh Circuit held that an administrator could defend its interpretation of a plan with arguments that the administrator had not presented when denying the claim for benefits. *Id.* at 922-923. In dicta, the court stated that even if an administrator failed fully to explain the basis for its interpretation in judicial proceedings, the court would have to remand the case to the administrator unless a denial of benefits would clearly be unreasonable. *Id.* at 923. The dicta in *Gallo* is inapposite here because the Xerox administrator had already offered a full interpretation of the plan provisions, and the court of appeals had rejected that interpretation and determined that the provisions were silent on the relevant issue.

ERISA remedy. The court in *Welsh* appears to have applied de novo review in upholding a district court's computation of benefits under a plan that allowed an offset for benefits received under the Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.* 54 F.3d at 1340-1342. But the benefits decision turned on interpretation of a plan phrase, "primary amount of payment," and there is no indication that the administrator had previously interpreted that phrase or that the Eighth Circuit had rejected its interpretation. See *id.* at 1341. The court in *Welsh* therefore had no occasion to address the standard for reviewing a district court's calculation of benefits where, as here, the plan is silent on the relevant issue, the plan administrator had previously expressed a view on the issue, and the court of appeals had rejected that position as arbitrary and capricious and in violation of ERISA.

Accordingly, the issues presented in No. 08-810 do not warrant this Court's review.

B. The Issues In Nos. 08-826 And 08-803 Do Not Warrant This Court's Review

The issues presented in Nos. 08-826 and 08-803, which challenge the court of appeals' decision that the release petitioners knowingly and voluntarily waived their ERISA claims, also do not warrant this Court's review.

1. The courts of appeals generally require that releases of rights under ERISA be knowing and voluntary and assess the validity of releases according to the totality of the circumstances. See, *e.g.*, *Smart* v. *Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 181-182 (1st Cir. 1995); *Leavitt* v. *Northwestern Bell Tel. Co.*, 921 F.2d 160, 162 (8th Cir. 1990). The court below similarly

required the releases here to be knowing and voluntary and applied a "totality of the circumstances" test to make that determination. Pet. App. 16a-17a, 20a-21a. There is no reason for this Court to revisit that fact-bound application of settled law to the circumstances of this case.

2. The release petitioners in No. 08-826 argue (Pet. 9-20) that the court of appeals effectively created a new "group" standard by failing to apply the "totality of the circumstances" test separately to each individual who signed a release. The 08-826 petitioners do not, however, dispute the Xerox petitioners' assertion that they failed to submit any individualized facts in the district court or to argue in the court of appeals that additional factual development was required. See 08-803 & 08-826 Br. in Opp. 12, 14-15. In light of that failure, the court below cannot be faulted for not considering the individual circumstances of each person who signed a release.

3. The release petitioners in No. 08-803 argue (Pet. 9, 11-14) that the court of appeals erroneously failed to apply federal common law principles in considering the validity of the releases. They contend that the court should have invalidated the releases based on principles requiring employer-drafted documents to be strictly construed against the drafter, subjecting waivers of pension claims to closer scrutiny than waivers of general contract claims, precluding enforcement of releases that were the product of extreme economic pressure, and directing that the SPD controls if it conflicts with a plan document. *Id.* at 11-14.

At bottom, that argument is merely a case-specific disagreement with the court of appeals' conclusion that the releases clearly waived the release petitioners' ERISA claims. See 08-803 Pet. 14. That court's deci-

sion is not reasonably read as a holding that federal common law principles do not apply in ERISA cases. As petitioners acknowledge, the court of appeals has applied the strict construction, close scrutiny, and SPD principles in prior cases. See 08-803 Pet. 12-13 (citing Second Circuit cases). The court did not reject those principles here, but rather simply concluded that the releases were knowing and voluntary. Pet. App. 16a-20a. The court's holding that the waivers were knowing and voluntary appears to have been based on a conclusion that the language of the releases was sufficiently clear to preclude reliance on the common law principles cited by the 08-803 petitioners. See *id.* at 20a; accord *Smart*, 70 F.3d at 178-181 (recognizing federal common law principles but upholding severance agreement that the court found clearly included release of ERISA benefits). Whether the release language was, in fact, sufficiently clear to support the decision below is a fact-bound question that does not warrant this Court's attention.

The 08-803 petitioners also contend (Pet. 15-18) that the court of appeals erred by failing to apply to the ERISA claims here OWBPA standards for determining when a release is knowing and voluntary under the ADEA. As the 08-803 petitioners acknowledge (Pet. 15), however, the OWBPA "imposes specific requirements for releases covering ADEA claims," *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422, 424 (1998)—not ERISA claims. See 29 U.S.C. 626(f)(1). The courts of appeals that have addressed the question agree that the OWBPA's requirements do not apply to releases of ERISA claims. *Chaplin* v. *NationsCredit Corp.*, 307 F.3d 368, 375-376 (5th Cir. 2002); *Madrid* v. *Phelps Dodge Corp.*, 211 Fed. Appx. 676, 680 (10th Cir. 2006).

The conclusion of the court below that the OWBPA is irrelevant to this case, Pet. App. 18a n.5, is consistent with those decisions. Review of the OWBPA issue is therefore not warranted.

4. Finally, contrary to the release petitioners' contention in their supplemental brief (08-803 & 08-826 Pet. Supp. Br. 3-10), *Kennedy* v. *Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865 (2009), provides no basis for either plenary review or vacating the decision below and remanding for further proceedings. In *Kennedy*, the Court held that a plan administrator was not required to give effect to a beneficiary's waiver of benefits due to her under the plan, because to do so would be contrary to ERISA's statutory requirement, in 29 U.S.C. 1104(a)(1)(D), that a plan shall be administered in accordance with the terms of plan documents. See 129 S. Ct. at 875. *Kennedy* may not govern the validity of the releases in this case. Unlike the waiver of benefits in *Kennedy*, the releases here purport to cover claims against the plan and its administrator, and the release petitioners' entitlement to benefits was in dispute when they signed the releases. In any event, the release petitioners did not raise a *Kennedy*-type claim in the courts below, and those courts did not address any such claim. Indeed, contrary to their new argument based on *Kennedy* that the releases are barred by statute, the release petitioners repeatedly argued below that federal common law governs the validity of releases of ERISA claims, and they sought this Court's review of whether the decision below "contravenes principles of contract interpretation under federal common law." 08-803 Pet. i. Accordingly, the release petitioners' *Kennedy* claim is not properly before this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

CAROL A. DE DEO
Deputy Solicitor for National Operations

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation

EDWARD D. SIEGER
Attorney
Department of Labor

MAY 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
MOTION FILED

JAN 29 2009

William K. Suter
Clerk

No. 08-810

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET. AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF AND BRIEF OF BUSINESS ROUNDTABLE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

MARIA GHAZAL
BUSINESS ROUNDTABLE
1717 Rhode Island Ave., NW
Suite 800
Washington, D.C. 20036
(202) 872-1260

JEFFREY A. LAMKEN
Counsel of Record
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

ALLIE SMITH
ERIC WINWOOD
BAKER BOTTS L.L.P.
2001 Ross Ave.
Dallas, TX 75201-2980
(214) 953-6500

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

MOTION OF BUSINESS ROUNDTABLE FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Business Roundtable hereby respectfully moves for leave to file the attached brief as *amicus curiae* in this case. The consent of the attorney for petitioners was obtained, and consent of the attorney for approximately 60 of the respondents was obtained as well. Consent of the attorney representing the remaining respondents, however, was refused.

Business Roundtable is an association of chief executive officers of leading U.S. companies that, collectively, comprise nearly a third of the total value of the U.S. stock markets. This case presents whether a district court has any obligation to defer to an ERISA plan administrator's interpretation of plan terms when the interpretation relates to terms that were not considered during an administrative claim for benefits proceeding (*i.e.*, a claim that is processed pursuant to an ERISA plan's internal claims procedures). That issue is a matter of grave concern to *amicus*, whose members manage companies that maintain ERISA plans. Those plans, like most ERISA plans of large companies, are regularly the subject of litigation relating to the interpretation of their provisions. Plan administrators often are responsible for the interpretation of those ERISA plans, and that responsibility often extends to resolving ambiguities in the plan documents. The decision below undermines the traditional discretion of plan managers to interpret plan provisions to the maximum benefit of all plan participants and undercuts ERISA's goal of national uniformity. Accordingly, Business Roundtable and its members have a strong interest in, and a unique perspective on, issues

arising from the construction and operation of ERISA plans.

Business Roundtable participated in this case as *amicus curiae* in the U.S. Court of Appeals for the Second Circuit both before the panel and on rehearing. It respectfully requests that this Court grant it leave to continue its *amicus* participation in this case by filing the attached *amicus* brief in support of the petition for a writ of certiorari.

MARIA GHAZAL
BUSINESS ROUNDTABLE
1717 Rhode Island
Ave., NW
Suite 800
Washington, D.C. 20036
(202) 872-1260

JEFFREY A. LAMKEN
Counsel of Record
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

ALLIE SMITH
ERIC WINWOOD
BAKER BOTTS L.L.P.
2001 Ross Ave.
Dallas, TX 75201-2980
(214) 953-6500

Counsel for Amicus Curiae

January 2009

No. 08-810

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET. AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF BUSINESS ROUNDTABLE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

MARIA GHAZAL
BUSINESS ROUNDTABLE
1717 Rhode Island Ave., NW
Suite 800
Washington, D.C. 20036
(202) 872-1260

JEFFREY A. LAMKEN
Counsel of Record
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

ALLIE SMITH
ERIC WINWOOD
BAKER BOTTS L.L.P.
2001 Ross Ave.
Dallas, TX 75201-2980
(214) 953-6500

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

1. Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other courts of appeals, that a district court has no obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits.

2. Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other courts of appeals, that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Interest of *Amicus Curiae*	1
Reasons For Granting The Petition	3
I. The Decision Below Conflicts With Longstanding Decisions From This Court And Other Courts Of Appeals	5
II. The Decision Below Has Profoundly Negative Consequences For The Administration Of Large ERISA Plans	8
A. Vesting The ERISA Plan Administrator With Authority To Interpret The Plan Is A Crucial Tool In Ensuring Uniform Plan Administration	8
B. The Decision Below Eviscerates The Uniformity Of Plan Interpretation That Is Essential To Countless Plan Administrator Decisions Beyond Benefits Determinations	9
III. The Impact Of The Court Of Appeals' Decision Is Exacerbated By Its Deference To District Court "Discretion"	12
Conclusion	14

TABLE OF AUTHORITIES

Page

CASES

Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan v. *Willard*, 393 F.3d 1119 (10th Cir. 2004) 7, 11

Armstrong v. *LaSalle Bank Nat'l Ass'n*, 446 F.3d 728 (7th Cir. 2006) 10

Baxter v. *Lynn*, 886 F.2d 182 (8th Cir. 1989) 8, 11

Devlin v. *Empire Blue Cross & Blue Shield*, 274 F.3d 76 (2d Cir. 2001) 13

Donovan v. *Eaton Corp. Long Term Disability Plan*, 462 F.3d 321 (4th Cir. 2006) 13

Feifer v. *Prudential Ins. Co.*, 306 F.3d 1202 (2d Cir. 2002) 13

Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989) 4, 5, 6, 9

Fort Halifax Packing Co. v. *Coyne*, 482 U.S. 1 (1987) 9

Hineman v. *Long Term Disability Plan of E*Trade Group, Inc.*, No. 07-55079, 2008 WL 2164336 (9th Cir. 2008) 13

Hunter v. *Caliber Sys., Inc.*, 220 F.3d 702 (6th Cir. 2000) 7, 11

Izzarelli v. *Rexene Prods. Co.*, 24 F.3d 1506 (5th Cir. 1994) 7, 11

Kennedy v. *Plan Admin. for DuPont Sav. & Inv. Plan*, No. 07-636, __ S. Ct. __ (slip op.) (2009) 6

TABLE OF AUTHORITIES—Continued

Page

McDonald v. *Provident Indem. Life Ins. Co.*, 60 F.3d 234 (5th Cir. 1995) 7, 11

Metropolitan Life Ins. Co. v. *Glenn*, 128 S. Ct. 2343 (2008) 4, 5, 6, 9

Moench v. *Robertson*, 62 F.3d 553 (3d. Cir. 1995) 7, 10

Moriarty v. *Svec*, 233 F.3d 955 (7th Cir. 2000) 13

Oliver v. *Coca-Cola Co.*, 546 F.3d 1353 (11th Cir. 2008) 7

Patterson v. *Shumate*, 504 U.S. 753 (1992) 8

Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. *Hendon*, 541 U.S. 1 (2004) 8

Sunbeam-Oster Co., Inc. Group Benefits Plan for Salaried & Non-Salaried Bargaining Hourly Employees v. *Whitehurst*, 102 F.3d 1368 (5th Cir. 1996) 7, 11

STATUTES

ERISA § 502(a)(1)(B) 12, 13

29 U.S.C. § 1132(a)(1)(B) 12

29 U.S.C. § 1144(a) 9

IN THE

Supreme Court of the United States

No. 08-810

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET. AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF BUSINESS ROUNDTABLE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE*

Business Roundtable is an association of chief executive officers of leading U.S. companies.[1] Together, those

---

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other

companies have $5 trillion in annual revenues and nearly 10 million employees. They comprise nearly a third of the total value of the U.S. stock markets and pay nearly half of all corporate income taxes paid to the federal government. Annually, they return $112 billion in dividends to shareholders and the economy. Business Roundtable is committed to advocating public policies that ensure vigorous economic growth, a dynamic global economy, and a well-trained and productive workforce, which is essential to future competitiveness. Business Roundtable companies give more than $7 billion a year in combined charitable contributions, representing nearly 60 percent of total corporate giving. They are technology innovation leaders, with more than $70 billion in annual research and development spending—more than a third of the total private R&D spending in the United States.

This case presents whether a district court may refuse to defer to the ERISA plan administrator's considered interpretation of an ambiguous term of an ERISA plan, and instead adopt its own reading of that term, simply because the administrator's interpretation was not issued in the course of processing a claim for benefits under the plan's internal claims procedures.[2] Business Roundtable's members have a profound interest in that issue. Members of Business Roundtable lead companies that manage ERISA plans. Under those ERISA plans, the plan administrator is often responsible for interpreting

---

than *amicus* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioner and respondents were notified of the intent to file this brief. The letters of those parties that consented to the filing of this brief have been filed with the Clerk's office; counsel for one group of respondents, however, declined consent.

[2] For purposes of this brief, the term "plan administrator" refers to any ERISA plan administrator, trustee, or other fiduciary who has been given the authority under the plan to interpret its terms.

ERISA plan documents, including the resolution of ambiguities within plan documents. Nonetheless, such plans—like most ERISA plans of large companies—are regularly the subject of litigation relating to the interpretation of their provisions.

If the ERISA plan delegates interpretive authority to the plan administrator, the administrator's interpretation has long been accorded deference by the courts. The decision below undercuts that traditional deference by refusing to defer to the plan administrator's construction except where that construction is issued in the context of a benefits determination under the plan's procedures. In adopting that approach, the decision eviscerates the ability of plan administrators to manage the plan equitably for the benefit of *all* plan participants. It guts the goal of nationwide uniformity, allowing federal district courts in hundreds of judicial districts to require different implementations of the same plan provisions based on different exercises of judicial "remedial" discretion. And it threatens to expose myriad daily decisions by plan administrators—all made outside formal plan benefits determinations—to replacement with judicial determinations even though the plan documents grant the plan administrator global authority to interpret plan terms and nowhere limit that authority to formal benefits determinations. Business Roundtable and its members have a strong interest in, and a unique perspective on, the issues presented in this case.

REASONS FOR GRANTING THE PETITION

This case presents issues of tremendous importance to ERISA plan participants, ERISA plan sponsors, and ERISA plan administrators. This Court has recognized that ERISA plans can grant the plan administrator authority to interpret the plan's terms. Where the plan documents provide that authority, the plan administra-

tor's interpretation of the plan is entitled to deference. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343, 2348 (2008); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-111 (1989). The Second Circuit's decision in this case creates an exception to that rule, declining deference to the plan administrator's interpretation of the plan where the interpretation is not offered in the course of processing a benefits claim under the plan's internal claims procedures. See Pet. App. 13a. Dismissing the administrator's interpretation as "mere opinion," the Second Circuit declined to require deference here because the interpretation was not "rendered" as a "decision" in a "benefits determination." *Ibid.* To make matters worse, the Second Circuit then ruled that the district court did not need to award benefits based on the proper construction of the plan, but could exercise "remedial discretion" to award *any* amount of benefits so long as the award is not "wholly unjust." *Id.* at 9a n.3, 13a.

Those holdings do not merely create conflicts with the decisions of other courts of appeals and this Court. They threaten severe disruption to the administration of ERISA plans generally. Plan administrators have numerous duties that frequently require them to interpret ambiguous provisions of the plan. Under the Second Circuit's rule, however, only interpretations of the plan made during an "original benefit determination[]" are entitled to deference. Pet. App. 13a. But plans such as the one at issue here grant the administrator broad discretionary authority to interpret the plan's terms generally—not merely in the context of processing formal benefits claims. The Second Circuit's decision, moreover, threatens to deny administrators the discretion they need to make myriad decisions to keep the plan operating, from the selection of intermediaries to the construction of investment restrictions. Outside the "benefit determination" context, the district court's construction—or its

"remedial discretion"—would control. That is impossible to reconcile with ERISA's goal of nationwide uniformity. It substitutes the potentially different exercises of discretion by district courts for the plan administrator's plan-wide construction of the plan. It could make plan administration impossible, subjecting plan administrators to competing requirements. And it threatens to require ERISA plan administrators to pay different benefits to plan participants based on the happenstance of where the claims were filed—which is precisely what happened here.

I. The Decision Below Conflicts With Longstanding Decisions From This Court And Other Courts Of Appeals

An ERISA plan administrator's interpretation of the provisions of the plan generally will be subject to *de novo* review in court, "unless the plan provides to the contrary." *Glenn*, 128 S.Ct. at 2348. Thus, where "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits *or to construe the terms of the plan*," *Firestone*, 489 U.S. at 115 (emphasis added), "'a *deferential standard* of review [is] appropriate,'" *Glenn*, 128 S.Ct. at 2348 (quoting *Firestone*, 489 U.S. at 111). In that circumstance, the plan administrator's "interpretation will not be disturbed if reasonable." *Firestone*, 489 U.S. at 111.

Here, there was no dispute that the relevant ERISA plan granted the plan administrator broad discretion to interpret the terms of the plan. See Pet. App. 78a, 141a-142a. The plan administrator twice exercised that discretion in this case. The plan administrator's original determination regarding plaintiffs' benefits claims was rejected by the courts because, according to the Second Circuit, it erroneously relied on a provision that was added to the plan after the relevant events took place. Pet. App. 24a; *id.* at 82a. Following that decision, the plan

administrator exercised his authority to interpret the plan once again, this time without relying on the inapplicable provision. That interpretation was presented to the courts "in briefs and at oral argument, in a sworn affidavit from the plan administrator, and in a written report and accompanying testimony from an independent actuary who analyzed the plan administrator's approach." Pet. App. 11a.

The court of appeals held, however, that the district court was not required to defer to the plan administrator's interpretation—which the court dismissed as a "mere opinion"—because that interpretation was not offered in the context of "render[ing] * * * the original benefit determinations." Pet. App. 13a. The court of appeals did not explain its reasoning. And its decision to arbitrarily restrict the requirement of deference to situations in which the interpretation is offered during an original benefits determination has no basis in law or logic. Indeed, the decision below directly conflicts with *Firestone* and *Glenn*, which made clear that the deference inquiry is governed entirely by *the terms of the plan*. If the plan provides the administrator with authority to interpret the plan generally, that interpretation is entitled to deference wherever plan interpretation is called for. See *Glenn*, 128 S. Ct. at 2348. Here, the plan expressly and expansively vested the administrator with the authority and obligation to interpret the plan; it did not distinguish between interpretations made in the context of benefits determinations and interpretations made in the myriad other situations in which the administrator may be called upon to construe ambiguous plan terms. Consequently, under the "straightforward rule of hewing to the directive of the plan documents," *Kennedy* v. *Plan Admin. for DuPont Sav. & Inv. Plan*, No. 07-636, __ S. Ct. __, slip op. at 14 (2009), *all* of the administrator's plan interpretations are entitled to deference—not just inter-

pretations given in a particular context or procedural posture as articulated post-hoc by different federal courts.

Court after court has come to precisely that conclusion. Analyzing *Firestone* and *Glenn*, those courts have found "no barrier to application of the arbitrary and capricious standard in a case * * * not involving a typical review of denial of benefits." *Hunter* v. *Caliber Sys., Inc.*, 220 F.3d 702, 711 (6th Cir. 2000). Indeed, at least six different circuits have analyzed the issue and concluded that deference to the plan administrator's interpretation is required (where provided by the plan) whenever a plan administrator must interpret ambiguous plan terms—not solely within the narrow benefits-determination context to which the decision below would confine it. See *Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353 (11th Cir. 2008) (deference owed to plan administrator's determinations that are made during the course of benefits litigation); *Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1123 (10th Cir. 2004) (deference owed to plan administrator's claim of reimbursement and subrogation rights); *Hunter*, 220 F.3d at 712 (deference owed to a plan administrator's determinations to suspend benefits); *Sunbeam-Oster Co., Inc. Group Benefits Plan for Salaried & Non-Salaried Bargaining Hourly Employees* v. *Whitehurst*, 102 F.3d 1368, 1373 (5th Cir. 1996) (deference owed to plan administrator's claim of reimbursement and subrogation rights); *Moench* v. *Robertson*, 62 F.3d 553, 566 (3d. Cir. 1995) (deference owed to plan administrator's interpretation of plan's provisions pertaining to the investment of plan assets); *McDonald* v. *Provident Indem. Life Ins. Co.*, 60 F.3d 234, 235 (5th Cir. 1995) (deference owed in a breach of fiduciary duty matter relating to a plan administrator's selection of an insurance underwriter); *Izzarelli* v. *Rexene Prods. Co.*, 24 F.3d 1506, 1513 (5th Cir. 1994)

(deference owed to plan administrator's decisions regarding when valuations and contributions of employer stock would be made for an ERISA plan); *Baxter* v. *Lynn*, 886 F.2d 182, 187 (8th Cir. 1989) (deference "clearly applicable" to plan administrator's claim for subrogation). The decision in this case cannot be reconciled with those decisions. For that reason alone, further review is warranted.

II. The Decision Below Has Profoundly Negative Consequences For The Administration Of Large ERISA Plans

The decision in this case also fatally undermines important ERISA policies; threatens inconsistent and incoherent results in case after case; and has the potential to make ERISA benefits administration wholly unworkable.

A. Vesting The ERISA Plan Administrator With Authority To Interpret The Plan Is A Crucial Tool In Ensuring Uniform Plan Administration

As "this Court has emphasized," "ERISA's goal is * * * 'uniform national treatment of pension benefits.'" *Raymond B. Yates, M.D., P.C. Profit Sharing Plan* v. *Hendon*, 541 U.S. 1, 17 (2004) (quoting *Patterson* v. *Shumate*, 504 U.S. 753, 765 (1992)). The need for ERISA plans to be governed by uniform, national standards is not a convenience but a necessity. Many of the companies run by Business Roundtable members administer ERISA plans that must serve tens of thousands of employee-participants spread across numerous States. ERISA plans could not operate efficiently, and large businesses could not responsibly sponsor them, if they had to comply with different rules and potentially provide different benefits to members merely because they reside in a different location or judicial district.

Discussion of "uniformity" under ERISA frequently focuses on ERISA's preemption provision, 29 U.S.C. § 1144(a), which prohibits state regulation of employee benefit plans so as to ensure that "an employer's administrative scheme" will not be subject to a patchwork of state laws imposing "conflicting requirements." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 10 (1987). From a practical perspective, however, the requirement that federal courts defer to the plan administrator's interpretation of the plan is equally critical to ensuring nationwide uniformity. When companies vest their plan administrator with interpretive authority, they are entitled to expect that, consistent with *Firestone* and *Glenn*, the administrator's reasonable "interpretation will not be disturbed"—regardless of which of our 678 federal district court judges the case happens to draw. *Firestone*, 489 U.S. at 111; see also *Glenn*, 128 S. Ct. at 2348. Allowing each district court to disregard the administrator's interpretation of the plan's terms and conduct its own *de novo* review of the language (or exercise broad discretion) creates an unacceptable—and entirely unnecessary—risk that plan administrators will be faced with irreconcilable interpretations of the plan.

B. The Decision Below Eviscerates The Uniformity Of Plan Interpretation That Is Essential To Countless Plan Administrator Decisions Beyond Benefits Determinations

The decision below declined to defer to the ERISA plan administrator's interpretations of the plan because that interpretation was not offered within the context of the "original benefit determination[]." Pet. App. 13a. Plan administrators, however, are called upon to interpret the terms of the plan in countless ways outside the context of benefits determinations, and they are frequently required to defend those interpretations in the district courts. The need for uniform interpretation of

the terms of an ERISA plan is no less crucial—and the logic behind deferring to the plan administrator's interpretation of the plan is no less forceful—simply because the interpretive issue arises outside the context of a benefits determination.

For example, plan administrators must interpret ERISA plan provisions with respect to the investment of plan assets. Such provisions often are set forth in an investment policy statement, which addresses the plan administrator's responsibilities with regard to selecting investments, as well as engaging third-party service providers to assist the administrator with respect to its responsibilities of administering the plan. Uniform interpretation of the plan's investment policy is, for obvious reasons, absolutely critical. An employee stock bonus plan under ERISA simply cannot function if a district court in Texas finds that the plan requires 100% of the plan investments to be in the employer's stock, while another district court in Florida finds that, under the same language of the same plan, the plan administrator breaches her fiduciary duties if she fails to diversify the plan's investments. While challenges to a plan administrator's investment decisions are frequently asserted as breach-of-fiduciary duty claims, they do not arise within the context of original benefits determinations. See *Moench*, 62 F.3d at 556; *Armstrong* v. *LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006). Under the decision below, district courts adjudicating those suits would not be required to defer to the plan administrator's interpretation of the plan's investment policy. That does not merely create a grave risk of liability that makes ERISA plans unattractive. It also makes it inevitable that different adjudicators will at some point exercise their *de novo* review authority (or their discretion) and impose irreconcilable investment duties on the plan.

Plan administrators likewise are often required to construe plan provisions when deciding whether to seek subrogation and reimbursement from plan participants. In that context too, the decision below guts the traditional deference accorded to the administrator's construction. Subrogation and reimbursement decisions are never made as part of a benefits determination. To the contrary, a plan's claims for subrogation and reimbursement can only be asserted in an action that post-dates the original benefits determination. See, *e.g.*, *Wal-Mart Assocs.*, 393 F.3d at 1123; *Sunbeam-Oster Co.*, 102 F.3d at 1373; *Baxter*, 886 F.2d at 187 (subrogation and reimbursement claims brought by plan in separate civil action). Once again, refusing deference merely because the decision is not made in a formal benefits determination proceeding is at war with the plan documents and the goal of uniformity. The plan gives the administrator general authority to construe plan terms—not just those related to the payment of benefits. And uniformity suffers where a judge in one district can agree with the plan administrator's construction that she can seek reimbursement for funds paid to an otherwise insured plan participant, while yet another judge exercises his own judgment to conclude that the administrator has no right under that same plan language to reimbursement from a similarly situated plan participant.

The issue is thus extraordinarily important and frequently recurring. Time and again, in context after context, administrators are called upon to interpret the terms of the plan outside the context of a benefits determination, such as in selecting an insurance underwriter for the plan, see *McDonald*, 60 F.3d at 235; determining when valuations and contributions of employer stock must be made, see *Izzarelli*, 24 F.3d at 1522; and determining when and how it is appropriate to suspend benefits, see *Hunter*, 220 F.3d at 712. All of those (and

countless other) decisions may be the subject of litigation outside of a benefits determination. Yet, under the decision below, a district court would owe no deference to the plan administrator's interpretation of the plan in any of those contexts. Large ERISA plans simply cannot function when there is no assurance of uniformity in the interpretation of—and no uniform respect for the administrator's interpretation of—the plan's provisions.

III. The Impact Of The Court Of Appeals' Decision Is Exacerbated By Its Deference To District Court "Discretion"

At the same time the Second Circuit circumscribed the deference owed to the plan administrator's interpretation of an ERISA plan, it expanded the discretion of district courts to impose their own, competing constructions. A district court's decision to require benefits payments, the Second Circuit held, cannot be overturned except in the instance of an "excess of allowable discretion." Pet. App. 8a. That not only increases the likelihood that district courts will reach inconsistent interpretations of ERISA plan provisions. It also severely limits the ability of the courts of appeals to correct those inconsistencies and restore uniformity. That ruling, moreover, conflicts with the decisions of other circuit courts, which have recognized that a district court's interpretation of an ERISA plan is subject to *de novo* review in the courts of appeals.

This action was brought under ERISA § 502(a)(1)(B), which provides a cause of action "for the benefits due under the terms of the plan." Pet. App. 53a. As ERISA's text makes clear, such a claim requires courts to determine what benefits are "due to [the beneficiary] *under the terms of his plan*," to construe the scope of "his rights *under the terms of the plan*," or to decide the "rights to future benefits *under the terms of the plan*." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). A § 502(a)(1)(B) claim for benefits "under the terms of the plan" is therefore

treated as akin to "the assertion of a contractual right," *Devlin* v. *Empire Blue Cross & Blue Shield*, 274 F.3d 76, 82 (2d Cir. 2001), and is governed by a uniform "federal common law of contract" derived from "general principles of contract law and * * * ERISA's purposes," *Feifer* v. *Prudential Ins. Co.*, 306 F.3d 1202, 1210 (2d Cir. 2002). Consistent with those principles, court after court has agreed that a *district court's* construction of a plan, and its determination of benefits due "under the terms of the plan," are legal determinations that are reviewed *de novo* on appeal. *Hineman* v. *Long Term Disability Plan of E*Trade Group, Inc.*, No. 07-55079, 2008 WL 2164336, at *1 (9th Cir. 2008); *Donovan* v. *Eaton Corp. Long Term Disability Plan*, 462 F.3d 321, 326 (4th Cir. 2006); *Moriarty* v. *Svec*, 233 F.3d 955, 962 (7th Cir. 2000).

The decision below squarely conflicts with those decisions. The court of appeals refused to review the district court's benefits determination by asking whether it reflected the *best* construction of the allegedly ambiguous plan terms. Instead, the panel held that the district court's determination would be reviewed for an abuse of "allowable discretion," and sustained unless "wholly unjust." Pet. App. 8a-10a & n.3. But § 502(a)(1)(B) does not provide for a suit for benefits in an amount that is not "wholly unjust." It provides for a suit for benefits due "under the terms of the plan." The issue is not the proper remedy for an ERISA violation, such as a breach of fiduciary duty. The question is the amount of benefits the plan provides for. That is a question of law that must be reviewed *de novo* on appeal.

The Second Circuit's decision affording district courts "remedial" discretion to award benefits is fatal to the interest of national uniformity ERISA was meant to foster. Under that decision, two district courts could interpret the same plan provision so as to impose conflicting obligations upon a plan administrator, and a court of

appeals would be powerless to resolve that conflict so long as each district court's interpretation, taken on its own, did not constitute an "excess of allowable discretion," *i.e.*, was not "wholly unjust." Pet. App. 8a. That decision is inconsistent with the very purpose of ERISA and turns ERISA's promise of uniformity and manageability into an illusion.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the petition for a writ of certiorari should be GRANTED.

Respectfully submitted.

MARIA GHAZAL
BUSINESS ROUNDTABLE
1717 Rhode Island
Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 872-1260

JEFFREY A. LAMKEN
Counsel of Record
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

ALLIE SMITH
ERIC WINWOOD
BAKER BOTTS L.L.P.
2001 Ross Ave.
Dallas, TX 75201-2980
(214) 953-6500

Counsel for Amicus Curiae

January 2009

JOINT APPENDIX

Supreme Court, U.S.
FILED
SEP 14 2009
OFFICE OF THE CLERK

(10)

NO. 08-810

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

Peter K. Stris
Counsel of Record
Whittier Law School
3333 Harbor Blvd.
Costa Mesa, CA 92626
(714) 444-4141

Counsel for Respondents

Robert D. Wick
Counsel of Record
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Petitioners

September 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

HAS TDL 9:60B

TABLE OF CONTENTS

Page

Docket Entries 1a

Xerox Corporation Retirement Income Guarantee Plan, 1989 Restatement 6a

Xerox: Planning For A Secure Retirement 43a

Xerox: Value Added To Your 1990 Compensation: Your Personal Benefits Statement (Paul Frommert) 57a

Memo from Paul Frommert to Patricia Nazemetz dated September 17, 1996 ..... 63a

Letter from Arlyn Kaster to Alan Clair dated June 23, 1999 ..... 65a

Letter from Sally Conkright to Alan Clair dated August 23, 1999 ..... 72a

Letter from Philip Cofield to Robert Jaffe dated June 22, 2006 ..... 79a

Letter from Philip Cofield to Robert Jaffe dated June 30, 2006 ..... 97a

Revised Supplemental Report of Lawrence Sher dated July 7, 2006 ..... 104a

Affidavit of Alan Clair dated February 26, 2003 ..... 117a

Frommert v. *Conkright*, No. 00-CV-6311, Transcript of Proceedings (W.D.N.Y. July 11, 2006) (testimony of Alan Clair) 120a

Frommert v. *Conkright*, No. 00-CV-6311, Transcript of Proceedings (W.D.N.Y. July 11, 2006) (testimony of Philip Cofield) 127a

Frommert v. *Conkright*, No. 00-CV-6311, Transcript of Proceedings (W.D.N.Y. July 12, 2006) (testimony of Lawrence Sher) 131a

Defendants' Exhibit C submitted at July 11-12, 2006 hearing 142a

APPENDIX

DOCKET ENTRIES

U.S. District Court, Western District of New York

Civil Docket for Case #: 6:00-cv-06311-DGL-JWF

* * * * *

Date Filed	#	Docket Text
		* * * * *
07/30/04	108	ORDER denying plaintiffs Paul Frommert's and Alan Clair's 88 Motion for Summary Judgment, granting defendants' 95 Motion to Dismiss, and dismissing the complaint. ****CLERK TO FOLLOW UP . Signed by Judge David G. Larimer on 7/30/04. (EMA,) (Entered: 07/30/2004)
08/04/04	109	JUDGMENT in favor of Defendants' against Plaintiffs. Signed by Clerk on 8/4/04. (TO,) (Entered: 08/04/2004)
		* * * * *
04/17/06	115	MANDATE of USCA VACATING AND REMANDING the Judgment in part for further proceedings in accordance withe (attached) opinion of the Second

		Circuit Court as to 110 Notice of Interlocutory Appeal * * * * * (USCA# 04-4609-cv) (MMG,) (Entered: 04/19/2006)
		* * * * *
01/24/07	137	ORDER granting in part and denying in part 129 plaintiff's Motion for a determination of the decision of the Second Circuit Court of Appeals, granting in part and denying in part defendants' 133 Motion for Partial Summary Judgment. Defendants are hereby directed to recalculate plaintiffs' retirement benefits, consistent with the terms of this Decision and Order and the January 6, 2006 decision of the Court of Appeals for the Second Circuit, and to pay each plaintiff a lump sum in the amount of the difference between the amount of benefits that each plaintiff has received, and the amount of the recalculated benefit, without any consideration of a "phantom account." Plaintiffs' claim for breach of fiduciary duty is denied as moot. * * * * * Signed by Judge David G. Larimer on 1/24/07. (EMA,) (Entered: 01/24/2007)

02/05/07	138	NOTICE OF INTERLOCUTORY APPEAL by Sally L. Conkright, Patricia M. Nazemetz, Xerox Corporation, Lawrence Becker, Xerox Corporation Retirement Income Guarantee Plan. Filing fee $ 455, receipt number 410. (MMG,) (Entered: 02/06/2007)

Second Circuit Court of Appeals

Court of Appeals Docket #: 04-4609-cv

* * * * *

Date Filed	Docket Text
	* * * * *
01/06/06	Judgment of the district court is Vacated in part and Remanded in part by published signed opinion filed. (NGG) [Entry date Jan 6 2006] [EA]
01/06/06	Judgment filed. [Entry date Jan 6 2006]
	* * * * *
04/05/06	Judgment MANDATE ISSUED. CLOSED [Entry date Apr 5 2006] [AM]
	* * * * *

Second Circuit Court of Appeals

Court of Appeals Docket #: 07-0418-cv

* * * * *

Date Filed	Docket Text
	* * * * *
07/24/08	7/24/08 Judgment of the district court is AFFIRMED IN PART, VACATED IN PART and REMANDED by published signed opinion filed. (CJS) [Entry date Jul 24 2008] [ML]
07/24/08	Judgment filed
	* * * * *
9/25/08	Order FILED DENYING motion Petition for rehearing by Appellant Conkright, et al., endorsed on motion dated 8/7/2008, Order FILED DENYING motion petition for rehearing en banc by Appellant Conkright, et al., endorsed on motion dated 8/7/2008 (RA) [Entry date Sep 26 2008] [ML]
	* * * * *
10/22/08	Judgment MANDATE ISSUED. CLOSED [Entry date Oct 22 2008] [ML]

XEROX CORPORATION

RETIREMENT INCOME GUARANTEE PLAN

1989 Restatement

ARTICLE 1

Definitions

When used herein, the words and phrases defined hereinafter shall have the following meaning unless a different meaning is clearly required by the context of the Plan. Except when otherwise indicated by the context, any masculine terminology herein shall also include the feminine and neuter, and the definition of any term herein in the singular may also include the plural.

Section 1.1. Accrued Benefit. The normal retirement benefit which a Member has earned up to any date, and which is payable at Normal Retirement Date in an amount computed in accordance with Section 4.2 or 4.3, based, however, only upon Average Monthly Compensation received and Years of Participation rendered by a Member up to the date as of which the Accrued Benefit is computed; provided, however, that for a Member who is a highly compensated employee within the meaning of Section 414(q)(1)(A) or (B) of the Code, such benefit shall be no less than the normal retirement benefit which such Member earned up to December 31, 1988, payable at Normal Retirement Date in an amount computed in accordance with Section 4.2 of the Plan's provisions in effect as of December 31, 1988 and, for a Member who is not a highly compensated employee within the meaning of Section 414(q)(1)(A) or (B) of the Code, such benefit

shall be no less than the normal retirement benefit which such Member earned up to December 31,1989, payable at Normal Retirement Date in an amount computed in accordance with Section 4.2 of the Plan's provisions in effect as of December 31,1988.

Section 1.2. Active Member. Any Employee who is receiving credit for service for purposes of accrual of benefits under Section 1.45.

Section 1.3. Actuarial Factors. The actuarial factors from time to time in effect forming a part of the group annuity contract with an insurance company utilized under the Profit Sharing Plan for the purchase of annuities under such Plan, which insurance contract and insurance company shall be selected by the Plan Administrator based upon competitive bids received from among those insurance companies submitting bids for the applicable Plan Year or other applicable period.

Section 1.4. ACTWU Plan. The Retirement Income Guarantee Plan of Xerox Corporation and The Xerographic Division, A.C.T.W.U., A.F.L.-C.I.O.

Section 1.5. Administrator. The Plan Administrator described in Article 10.

Section 1.6. Average Monthly Compensation. The sum of the Member's five highest calendar years of compensation paid during periods while he was an Active Member divided by sixty. If the Member has not been an Active Member for five full calendar years, then the sum of his compensation in all of the full calendar years in which he was an Active Member (if the Member has been an Active Member for less than at least one full calendar year, then partial calendar years shall be adjusted to a full

calendar year's pay by assuming that the average pay for the partial year is the average pay for the entire year) divided by twelve times such number of years. For the purpose of this Section, the period of Active Membership to be used shall commence with the latest to occur of:

a. January 1, 1975,

b. The Member's last date of hire, or

c. The Member's last period in which he was an Active Member.

For the purpose of this Section, while a Member is on salary continuance (due to a reduction in force or otherwise) or an approved leave of absence, he shall be deemed to be an Active Member and if the leave is unpaid leave, he shall be assumed to be earning compensation during such leave at the same rate in effect prior to commencement of such leave.

For the purpose of this Section, compensation is the total amount reported by the Employer to the Federal Government for withholding tax purposes plus (i) any contributions made to a Member's Employee Before-Tax Savings Account under the Profit Sharing Plan and (ii) any salary redirected by a Member under the salary redirection plan maintained by the Employer pursuant to Section 125 of the Internal Revenue Code of 1986 (not including any amounts excluded under subsection (j) hereof), less any amount so reported which is attributable to:

a. Payments under the Profit Sharing Plan and payments by the Employer to offset the limit on annual additions under the Profit Sharing Plan by reason of Section 415 of the Code;

b. Prizes, awards or bonuses not payable in cash;

c. Any amount paid or reimbursed with respect to a specific item of expense incurred as, for example, relocation allowance, tuition aid allowance, walking tech rep allowance, mileage allowance;

d. Any amount realized by a Member as income for federal income tax purposes upon the exercise of a non-qualified stock option or stock appreciation right granted under any plan established by the Employer;

e. Any amount realized as income for federal income tax purposes under the 1976 Executive Long-Term Incentive Plan;

f. Lump sum payments for unused time under an hourly Occasional Absence Plan;

g. Any amounts reported as income for federal income tax purposes arising from group life insurance;

h. Any amounts paid or withheld for federal income tax purposes relating to tax gross-up or equalization;

i. Any amounts reported as income for federal income tax purposes arising from the one half of one percent bonus paid to certain collective bargaining employees as an adjustment for discontinuance of a pension plan, membership in Par Club, premiums paid for automobile liability insurance, executive financial counseling, officer expense reimbursement, personal use of the Company's aircraft, lapse of restrictions on Class B shares under the Company's Restricted Stock Purchase Plan or expatriate allowances;

j. Any portion of the Member's Flexible Benefit Account under the salary redirection plan maintained by the Employer pursuant to section 125 of the Internal Revenue Code of 1986 which he elected to receive in cash;

k. Lump sum severance payments which a Member receives under the Xerox Corporation voluntary reduction in force program (but not severance payments by the Employer payable over a term certain);

l. Any amounts realized by a Member as income for federal income tax purposes under the Xerox Financial Services, Inc., 1988 Long-Term Plan;

m. Any distribution from the Xerox Corporation Deferred Compensation Plan.

Compensation as a part-time employee or received as salary continuance (whether due to a reduction in force or otherwise) at less than full-time pay shall be adjusted to full-time pay.

A Member on Disability shall be considered to be receiving compensation during such Disability at the same rate in effect prior to commencement of such Disability.

In addition to any other applicable limitations which may be set forth herein and notwithstanding any other contrary provision hereof, compensation taken into account hereunder shall not exceed $200,000, adjusted for changes in the cost of living as provided in Section 415(d) of the Code, for the purpose of calculating a Member's accrued benefit (including the right to any optional benefit hereunder) for any plan year commencing after

December 31, 1988. However, the accrued benefit determined in accordance with this provision shall not be less than the accrued benefit on May 31, 1989, without regard to this provision. Notwithstanding the preceding sentence, the accrued benefit of any Member who is a highly compensated employee within the meaning of Section 414(q) of the Code is reduced to the extent a benefit has accrued with respect to compensation in excess of $200,000 during the 1989 plan year before the date hereof.

Section 1.7. Board or Board of Directors. The Board of Directors of Xerox Corporation or any successor thereto.

Section 1.8. Cash Balance Retirement Account. The Account established for a Member pursuant to Article 18.

Section 1.9. Code. The Internal Revenue Code of 1986, as amended, or as it may be amended from time to time, or any successor thereto.

Section 1.10. Company. Xerox Corporation or any successor thereto.

Section 1.11. Disability. A Member shall be considered to be on Disability during such periods of time that

a. he is receiving short-term disability payments, and

b. he is receiving disability benefits under the U.S. Social Security Act during periods of long-term disability, provided, however, that a member who elects to terminate his disability status with the Employer and receive a distribution from the Profit Sharing Plan shall thereafter cease being on

Disability under the Plan. If he does not so terminate or retire earlier, a Member on Disability shall be deemed to retire on his Normal Retirement Date.

Section 1.12. Early Retirement Age. The first day of the month coincident with or following the date on which occurs the later of:

a. The attainment of ten Years of Service by the Member, or

b. The earlier of (i) attainment of age fifty-five during active employment with the Employer or (ii) recommencement of active employment with the Employer after the attainment of age fifty-five.

Section 1.13. Effective Dates. The effective date of the original Plan is July 1, 1977. The effective date of the Plan as restated by this instrument is January 1, 1989, unless otherwise indicated herein and except that the effective dates of those sections of the Plan which have been amended by amendments to the Plan since July 1, 1977 shall be as provided in such amendments.

Section 1.14. Employee. Each employee (including persons on salary continuance, whether due to a reduction in force or otherwise) of the Company and any other Subsidiary Company, domestic or foreign, which shall adopt the Plan with the approval of the Company, and each employee of Xerox Employees Federal Credit Union, except the following:

a. Any person covered by a collective bargaining agreement, the terms of which do not require coverage under this Plan.

b. A person who is a non-resident alien and who receives no earned income from such companies which constitutes income from sources within the United States.

c. A person employed pursuant to the Xerox Experiential Learning Program or any similar program conducted by any Employer.

d. Leased Employees and independent contractors;

e. An employee of a foreign subsidiary of the Employer who is on temporary assignment to the Employer, and who is accruing benefits under the profit sharing retirement plan of his employer.

Section 1.15. Employer. The Company, each Subsidiary, any company which a member of a controlled group of corporations (as defined in Code Section 414(b) and the regulations thereunder) which includes the Company, any trade or business under common control (as defined in regulations under Code Section 414(c)) with the Company, any organization which is a member of an affiliated service group, (within the meaning of Section 414(m) of the Code) which includes the Company and any other organization or arrangement to the extent required to be aggregate by regulations pursuant to regulations under Section 414(o) of the Code and, where applicable, the Xerox Employees Federal Credit Union.

Section 1.16. Employment Commencement Date. The date on which a person first receives credit for an Hour of Service with the Employer.

Section 1.17. Employment Year. The period starting on the Employment Commencement Date or the Reemployment Commencement Date and the anniversaries thereof, and ending on the day before the next anniversary of such Date.

Section 1.18. ERISA. The Employee Retirement Income Security Act of 1974.

Section 1.19. General Fund. Such fund as it is described in the Salaried Plan at the time of the Effective Date and such successor or replacement funds established thereafter under the Salaried Plan.

Section 1.20. Guaranteed Fund. Such fund as it is described in the Salaried Plan at the time of the Effective Date and such successor or replacement fund established thereafter under the Salaried Plan.

Section 1.21. Hour of Service. Each hour for which an employee is paid, or entitled to payment, for the performance of duties for the Employer or while on salary continuance (whether due to a reduction in force or otherwise).

Section 1.22. Joint and Survivor Annuity. An annuity payable monthly during the joint lives of the Member and the Member's Spouse in the amount of the Member's monthly retirement benefit as determined under Article 4 and which provides for payment of fifty percent of such amount to the Member's Spouse for the life of such Spouse commencing upon the death of the Member and which is the actuarial equivalent of a Life Annuity.

Section 1.23. Leased Employee. Any individual who

a. is not an independent contractor with respect to the Employer;

b. provides services pursuant to an agreement between the Employer and any other person or entity (hereinafter referred to as "the leasing organization");

c. has performed such services on a substantially full-time basis for a period of at least one year;

d. performs services of a type historically performed in the business field of the Employer by employees.

Section 1.24. Life Annuity. An annuity payable monthly during the life of the Member (or the lives of a Member and his Spouse in the case of receipt of a Joint and Survivor Annuity) in the amount of the Member's monthly retirement benefit (or his Spouse's monthly retirement benefit, if applicable in the case of a deceased Member) as determined under Article 4.

Section 1.25. Member. Every Employee who becomes a Member in accordance with Article 2. A Member shall cease being a member as of the date when he and his beneficiary, if any, cease to have any accrued benefit under the Plan.

Section 1.26. Normal Retirement Age. The sixty-fifth birthday of a Member or the sixtieth birthday of a Member who is, on such Member's sixtieth birthday, the pilot of an airplane operated by the Company.

Section 1.27. Normal Retirement Date. The first day of the month coincides with or next following the date of the sixty-fifth birthday of a Member or the

first day of the month coincident with or next following the sixtieth birthday of Member who is, on such Member's sixtieth birthday, the pilot of an airplane operated by the Company.

Section 1.28. Period of Service. All periods of employment (including all periods during which an Employee is on salary continuance, whether due to reduction in force or otherwise) commenting on the Employment Commencement or Reemployment Commencement Date, whichever is applicable, and ending on the applicable Severance From Service Date subject to the following:

a. Periods of employment which terminated prior to January 1, 1976 shall be ignored.

b. If a person severs from service by reason of quit, discharge or retirement and within twelve months of the Severance From Service Date performs an Hour of Service, the Period of Severance shall be counted in the period of employment. However, if such severance from service occurs during an absence from service of twelve months or less for any reason other than a quit, discharge, retirement or death, only if the person performs an Hour of Service within twelve months of the date the person was first absent from service must the Period of Severance be counted.

c. If a person severs from service for any reason and performs an Hour of Service before the Period of Severance encompasses twelve months from the commencement of his Employment Year, the Period of Severance shall be counted in the period of employment.

d. All periods of Disability prior to Normal Retirement Date shall be counted in the period of employment.

e. The period of a paid leave of absence of any length under the Company's Social Service Leave Program shall be counted as a period of employment.

f. All periods of Military Service shall be counted as a period of employment to the extent required by federal law, provided that the person returns to the employment of the Employer within such period as may be required by federal law.

g. Periods during which services were performed for an Employer as a Leased Employee shall be counted including, in the case of an Employee, services performed in a status which would have been that of a Leased Employee but for the requirement set forth in Section 1.23(c).

Section 1.29. Period of Severance. The period of time commencing on the Severance From Service Date and ending on the date on which the person again performs an Hour of Service for the Employer.

Section 1.30. Plan. The "Xerox Corporation Retirement Income Guarantee Plan", as set forth herein or in any amendment hereto.

Section 1.31. Plan Year. The twelve-month period running from January 1 to December 31.

Section 1.32. Profit Sharing Plan. The Xerox Corporation Profit Sharing Retirement and Savings Plan and The Profit Sharing Plan of Xerox Corporation and The Xerographic Division, A.C.T.W.U., A.F.L.-C.I.O. as in effect on the Effective

Date and as they shall from time to time be thereafter amended.

Section 1.33. Qualified Pre-Retirement Survivor Annuity. A survivor annuity for the life of the Spouse wherein the payments under this Plan, if any, to such Spouse are not less than the amounts which would have been paid as a survivor annuity under a Joint and Survivor Annuity if:

a. In the case of a Member who dies after the earliest date on which such Member could elect to receive benefits (hereinafter referred to as the "earliest retirement age"), such Member retired and had been entitled to receive a Joint and Survivor Annuity on the day preceding his date of death; or

b. In the case of a Member who dies on or before the earliest retirement age, such Member had

(i) separated from the service of the Employer on the date of such Member's death;

(ii) survived to the earliest retirement age;

(iii) retired with an immediate Joint and Survivor Annuity on the earliest retirement age; and

(iv) died on the day after the day on which he would have attained the earliest retirement age.

Notwithstanding the foregoing, in the case of a Member who separates from the service of the Employer prior to such Member's death, the amount of the Qualified Pre-Retirement Survivor Annuity is to be calculated by using the Member's actual date of separation from service rather than the Member's date of death.

Section 1.34. Reemployment Commencement Date. The first date following a Period of Severance from service of the Employer which is not required to be taken into account under Sections 1.28b or c, on which the person performs an Hour of Service.

Section 1.35. Retirement Account. The Member's account balance in his Retirement Account maintained under the Profit Sharing Plan at the time as of which the calculation of an accrued benefit under the Plan is determined ("relevant time"). Where a Member has received a distribution from his Retirement Account prior to the relevant time (other than a lump sum payment of less that $3,500 made under Section 8.5 of the Plan), it shall be assumed that his actual Retirement Account balance at the relevant time includes an amount equal to the sum so distributed as it would have increased or decreased during the period from the time of the distribution to the relevant time if such sum had been invested in the General Fund under the Profit Sharing Plan in which the Member participated at the time of the distribution. In the event that at the relevant time the Retirement Account of a retiring Member has not been credited with the Employer contribution for the retiring Member's final year of employment, it shall be assumed that there is added to the Member's Retirement Account either (i) an amount determined as though the Employer contribution for that year to Participants' Retirement Accounts is at the rate of five percent of compensation as defined in the Profit Sharing Plan, or (ii) the actual amount of the contribution to be made to such Participant's Retirement Account for the final year of employment, if known. In the event

that a Member has deferred compensation under the Company's deferred compensation program, it shall be assumed that there is added to such Member's Retirement Account (i) the amount which would have been added to such Member's Retirement Account from the Employer contribution if such compensation had not been deferred and (ii) the amount of additional deferral under such program made to adjust for the loss of profit sharing contribution to the extent related to the Member's Retirement Account, as such amounts would have increased or decreased during the period from the time as of which the contribution would have been credited to such Member's Retirement Account to the relevant time if such sum had been invested in the General Fund. In the event that a Member has received a cash payment under the Company's policy of increasing compensation by the amount which cannot be added to his Retirement Account under the Profit Sharing Plan by reason of the limitation contained in Section 415 of the Code, it shall be assumed that there is added to such Member's Retirement Account the amount of such payment as such sum would have increased or decreased during the period from the time as of which it would otherwise have been credited to such Employee's Retirement Account to the relevant time if such sum had been invested in the General Fund. After the contribution made pursuant to the Salaried Plan with respect to the year ended December 31, 1989, the Retirement Account shall be transferred to this Plan pursuant to the provisions of Section 6.01 of the Salaried Plan.

Section 1.36. Salaried Plan. The Xerox Corporation Profit Sharing Retirement and Savings Plan, as in effect on the Effective Date and as from time to time amended.

Section 1.37. Severance From Service Date. The earlier of

a. The date on which a person quits, retires or is discharged from, or dies during service with the Employer; or

b. The first anniversary of the first date of a period in which a person remains absent from the service of the Employer, with or without pay, for any reason other than Disability, quit, retirement, discharge or death.

For the purposes of this Section, an Employee on salary continuance (whether due to a reduction in force or otherwise) shall not be deemed to have severed from service while on salary continuance.

Section 1.38. Social Security Benefit. The monthly benefit which a retired Member or a terminated Member receives or would be entitled to receive at the age at which unreduced retirement benefits are then paid under the U.S. Social Security Act (or at his sixty-second birthday, in the case of a retired Member who has at least thirty Years of Service or who, on such Member's retirement, is the pilot of an airplane operated by the Company), as a primary insurance amount under the U.S. Social Security Act, as amended, whether he applies for such benefit or not, and even though he may lose part or all of such benefit for any reason.

The amount of such Social Security Benefit to which the retired or terminated Member is or would be entitled shall be computed by the Administrator for the purposes of the Plan as of the January 1 of the calendar year of retirement or termination. In computing such amount, the Administrator shall use estimated benefit tables developed by the Plan's actuary, the five-year average compensation of the Participant and the assumption that the Participant's compensation prior to the fifth year preceding the year of termination grew in accordance with average national wages.

Notwithstanding the foregoing, in the case of a Member who is retiring on or after reaching Early Retirement Age (but prior to reaching Normal Retirement Age), such Member may elect to have his Social Security Benefit calculated using (i) actual wages up to the date of his retirement, plus wages up to Normal Retirement Age with the assumption that such wages continued at the same rate as at the time of retirement or (ii) the five-year average compensation of the Participant at the time of retirement with the assumption that the Participant's compensation prior to the fifth year preceding the year of termination grew in accordance with average national wages, plus wages up to Normal Retirement Age with the assumption that such wages continued at the same rate as at the time of retirement.

Notwithstanding the foregoing, where a Member who has reached Normal Retirement Age (or age sixty-two, in the case of a Member who has at least thirty Years of Service) can demonstrate by proof satisfactory to the Administrator that his actual

Social Security Benefit is less than the amount calculated under this Section, the Administrator shall compute the Member's benefits under the Plan using such actual Social Security Benefit. Such Member must submit such proof (or, as to any Member, proof of his actual earnings history for Social Security Benefit purposes) within thirty days of retirement or within fifteen days after the Member receives such proof (or proof of his actual earnings history for Social Security Benefit purposes) from the Social Security Administration if the Member demonstrates by proof satisfactory to the Administrator that the delay in submitting proof to the Administrator is attributable to the Social Security Administration.

Section 1.39. Spouse. The widow or widower of a deceased Member.

Section 1.40. Subsidiary Company. Any company, at least a majority of the voting stock of which is owned, directly or indirectly, by the Company.

Section 1.41. Transitional Retirement Account. The account established for a Member pursuant to Article 17.

Section 1.42. Trust or Trust Fund. Any contracts of insurance, other property, and the sum of the contributions made by an Employer which are held by the Trustee in a trust created pursuant hereto increased by any profits or income applicable thereto and decreased by any losses or reasonable expenses incurred in the administration of the Trust and by any payments made therefrom under the Plan.

Section 1.43. Trustee. The one or more individuals, banks, trust companies or other

financial institutions who are named in the Agreement of Trust and who hold and manage the Trust Fund.

Section 1.44. Years of Participation. All periods of employment with the Employer commencing on the Member's Employment Commencement or Reemployment Commencement Date, whichever is applicable, and ending on the applicable Severance From Service Date subject to the following:

a. Periods of employment during which the Member does not qualify as an Employee shall be disregarded.

b. Periods of employment which terminated prior to January 1, 1976 shall be ignored.

c. All periods of Disability prior to Normal Retirement Date during which compensation is paid by the Employer directly to the Member shall be counted in a Member's period of employment provided the Member qualified as an Employee at the commencement of the Disability.

d. The period of a paid leave of absence of any length under the Company's Social Service Leave Program which commences when the Member qualifies as an Employee shall be counted as a period of employment.

e. Service of part-time Employees, or Employees on salary continuance (whether due to a reduction in force or otherwise) at less than full-time pay shall be adjusted to a proportion of full-time service or full-time pay, as the case may be, under non-discriminatory rules of general applicability adopted by the Administrator.

f. No credit shall be given for any period with respect to which a lump sum payment has been made under Sections 8.5 and 8.8.

g. All service credited for the purpose of accrual of benefits under the ACTWU Plan shall be considered a period of employment for purposes of this Section.

h. All periods of Military Service shall be counted as a Member's period of employment to the extent required by federal law, provided that the person returns to the employment of the Employer within such period as may be required by federal law.

i. All periods during which a Member is on salary continuance (whether due to a reduction in force or otherwise) shall be considered a period of employment for purposes of this Section.

j. Non-successive periods of employment shall be aggregated and any fractional month at the end of a period of employment shall be counted as a whole month. After such aggregation any period of less than twelve whole months snail be expressed as a fraction of a Year of Participation.

Section 1.45. Years of Service. A Member shall receive credit for a number of years of service equal to the number of whole years of the Member's Period of Service. Non-successive Periods of Service shall be aggregated and less than whole year Periods of Service (whether or not consecutive) shall be aggregated on the basis that twelve months of service equal a whole year of service. Thirty days shall be deemed to be a month in the case of fractional months. Any fractional year remaining after such aggregation shall be disregarded.

* * * * *

Section 4.2. Retirement Benefits for Members Who Retire on or before December 31, 1989. An eligible Member who retires on or before December 31, 1989 shall be entitled to a monthly normal retirement benefit of the largest of a, b or c below, plus d below:

a. One and four-tenths percent (1.4%) of Average Monthly Compensation of the Member multiplied by the number of full and fractional Years of Participation up to thirty less

(i) the monthly amount which would be payable under a Life Annuity which could be purchased with the Member's Retirement Account assuming commencement of such annuity at the same time as the commencement of benefits under the Plan and using the Actuarial Factors, provided, that for purposes hereof, with respect to those members who were "Principals" or "Associates" of Xerox Development Corporation, it shall be assumed that the Member's Retirement Account includes any amounts which would have been contributed had the Member been a participant in the Profit Sharing Plan on July 1, 1977, or the first date such Member would otherwise have been eligible to commence participation in the Profit Sharing Plan, whichever is later.

(ii) the vested accrued monthly benefit which would be payable as a Life Annuity under the XDS Retirement Income Plan assuming commencement of such benefit at the same time as the commencement of benefits under the Plan.

(iii) the vested accrued monthly benefit which would be payable as a Life Annuity from Company contributions under Equitable Group Annuity Contract No. AC-158 assuming commencement of such benefit at the same time as the commencement of benefits under the Plan.

(iv) the vested accrued monthly benefit which would be payable as a Life Annuity under any TIAA-CREF Policy to which the Company or any of its predecessors made contributions assuming commencement of such benefit at the same time as the commencement of benefits under the Plan.

(v) the vested accrued monthly benefit which would be payable as a Life Annuity under the ACTWU Plan assuming commencement of such benefit at the same time as the commencement of benefits under the Plan.

(vi) the vested accrued monthly benefit which would be payable as a Life Annuity from the respective central pension funds maintained by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the International Printing and Graphics Communications Union, the Columbus Typographical Union and the Graphic Arts International Union and 50% of the vested accrued monthly benefit which would be payable as a Life Annuity from the central pension fund maintained by the International Union of Operating Engineers.

(vii) the Member's monthly normal retirement benefit under Section 11.9.

b. One percent of Average Monthly Compensation of the Member multiplied by the

Member's full and fractional Years of Participation less the amounts specified in subsections a(i), a(ii), a(iii), a(iv), a(v), a(vi) and a(vii) of this Section 4.2.

c. The benefit which would have been payable at Normal Retirement Date accrued at the time of an earlier termination of employment of the Member, if any.

d. With respect to individuals who were both Employees and Members at any time between January 1, 1982 and November 17, 1982 (other than any such individual who on or before May 29, 1986 terminated employment with the Employer before completing ten Years of Service) and who, upon retirement, will be entitled to a normal retirement benefit under Section 4.2a, b or c of the Plan, an amount equal to ninety-six one hundredths of one percent times the Member's monthly normal retirement benefit under Section 4.2 (computed without regard to this paragraph d) accrued as of November 17, 1982, commencing on the first anniversary of each such Member's actual retirement date after age sixty-five, with such amount increasing non-cumulatively each year thereafter by an amount equal to an additional ninety-six one hundredths of one percent of the monthly benefit accrued as of November 17, 1982, provided, however, that any such Member shall not be entitled to a benefit under this subsection d if the proposed settlement as set forth in a settlement agreement pertain to Anglim, et al v. Xerox Corporation, Civil Action No. B-83-251 (EBB) (the "Anglim action") is not consummated pursuant to such settlement agreement for any reason; provided, however, that the Plan Administrator may, in his discretion, elect

to make one annual payment hereunder equal to the amount to be paid for the succeeding twelve months.

Section 4.3. Retirement Benefits for Members Who Retire on or after January 1, 1990. An eligible Member who retires on or after January 1, 1990 shall be entitled to a monthly normal retirement benefit of the largest of a or b or c, in each case plus d below, or e or f below.

a. One and four-tenths percent (1.4%) of Average Monthly Compensation of the Member multiplied by the number of full and fractional Years of Participation up to thirty less

(i) the vested accrued monthly benefit which would be payable as a Life Annuity under the XDS Retirement Income Plan assuming commencement of such benefit at the same time as the commencement of benefits under the Plan.

(ii) the vested accrued monthly benefit which would be payable as a Life Annuity from Company contributions under Equitable Group Annuity Contract No. AC-158 assuming commencement of such benefit at the same time as the commencement of benefits under the Plan.

(iii) the vested accrued monthly benefit which would be payable as a Life Annuity under any TIAA-CREF Policy to which the Company or any of its predecessors made contributions assuming commencement of such benefit at the same time as the commencement of benefits under the Plan.

(iv) the vested accrued monthly benefit which would be payable as a Life Annuity under the ACTWU Plan assuming commencement of such

benefit at the same time as the commencement of benefits under the Plan.

(v) the vested accrued monthly benefit which would be payable as a Life Annuity from the respective central pension funds maintained by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the International Printing and Graphics Communications Union, the Columbus Typographical Union and the Graphic Arts International Union and 50% of the vested accrued monthly benefit which would be payable as a Life Annuity from the central pension funds maintained by the International Union of Operating Engineers.

(vi) the Member's monthly normal retirement benefit under Section 11.9.

b. One percent of Average Monthly Compensation of the Member multiplied by the Member's full and fractional Years of Participation less the amounts specified in subsections a(i), a(ii), a(iii), a(iv), a(v), and a(vi) of this Section 4.3.

c. The benefit which would have been payable at Normal Retirement Date accrued at the time of an earlier termination of employment of the Member, if any.

d. With respect to individuals who were both Employees and Members at any time between January 1, 1982 and November 17, 1982 (other than any such individual who on or before May 29, 1986 terminated employment with the Employer before completing ten Years of Service) and who, upon retirement, will be entitled to a normal retirement benefit under Section 4.3 of the Plan, an amount

equal to ninety-six one hundredths of one percent times the Member's monthly normal retirement benefit under Section 4.2 of the Plan as in effect immediately prior to this 1989 Restatement of the Plan (computed without regard to this paragraph d) accrued as of November 17, 1982, commencing on the first anniversary of each such Member's actual retirement date after age sixty-five, with such amount increasing non-cumulatively each year thereafter by an amount equal to an additional ninety-six one hundredths of one percent of the monthly benefit accrued as of November 17, 1982, provided, however, that any such Member shall not be entitled to a benefit under this subsection d if the proposed settlement as set forth in a settlement agreement pertaining to Anglim, et al v. Xerox Corporation, Civil Action No. B-83-251 (EBB) (the "Anglim action") is not consummated pursuant to such settlement agreement for any reason; provided, however, that the Plan Administrator may, in his discretion, elect to make one annual payment hereunder equal to the amount to be paid for the succeeding twelve months.

e. The monthly benefit which could be purchased with a Member's Transitional Retirement Account, as calculated using annuity rates established by the PBGC.

f. The monthly benefit which could be purchased with a Member's Cash Balance Retirement Account, as calculated using annuity rates established by the PBGC.

* * * * *

Section 9.6. Nonduplication of Benefits. In the event any part of or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, if Section 8.8 does not apply to such distribution and such Member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

* * * * *

ARTICLE 10

Administration of the Plan

Section 10.1. Appointment of the Administrator. The administration of the Plan, as provided herein, including the payment of all benefits to Members or their beneficiaries, shall be vested in and shall be the responsibility of the Plan Administrator, who is the administrator and named fiduciary of the Plan, who shall be appointed by the chief executive officer of the Company (or an officer designated by the chief executive officer), and who shall serve until the appointment of a successor Plan Administrator by amendment to this Section. Until so amended, the Plan Administrator is Patricia M. Nazemetz.

Section 10.2. Authority of Administrator. In the administration of the Plan the Administrator may, subject always to the requirements of Section 10.5,

a. Employ agents to carry out non-fiduciary responsibilities;

b. Employ agents to carry out fiduciary responsibilities (other than trustee responsibilities as define din Section 405(c)(3) of ERISA);

c. Consult with counsel, who may be counsel to the Company;

d. Provide for the allocation of fiduciary responsibilities (other than trustee responsibilities as defined in Section 405(c)(3) of ERISA);

e. Construe the Plan and the Trust Agreement thereunder; and

f. Should any defect, omission or inconsistency in the Plan or the Trust Agreement be discovered at any time, the Administrator shall be empowered to take such action as may be necessary to correct such defect, rectify such omission or reconcile such inconsistency.

* * * * *

ARTICLE 17

Transitional Retirement Account

Section 17.1. Transfer of Retirement Account. Effective as of January 1, 1990, there shall be established for each Member an account to be known as the "Transitional Retirement Account". Each Member's Transitional Retirement Account shall be credited with the units in the Member's Retirement Account under the Salaried Plan, if any, valued as at December 31, 1989, plus the Employer contribution to the Retirement Account under the Salaried Plan with respect to the year ended December 31, 1989; provided that for the purposes hereof, with respect to those Members who were "Principals" and "Associates" of Xerox Development Corporation, it shall be assumed that the Member's Retirement Account included any amounts which would have been contributed had the Member been a Participant

in the Profit Sharing Plan on July 1, 1977, or the first date such Member would have otherwise been eligible to commence participation in the Profit Sharing Plan, whichever is later. No further contributions shall be made to the Transitional Retirement Account after such contribution.

Section 17.2. Investment of Transitional Retirement Account. Each Member's Transitional Retirement Account shall be invested by the Trustee under this Plan in the General Fund or the Guaranteed Fund in the same proportions as the Member's Retirement Account was invested at December 31, 1989.

Section 17.3. Valuation of Transitional Retirement Account.

(a) The Trustee shall determine the value of the assets held in the General Fund and the Guaranteed Fund (excluding life insurance contracts in the case of the General Fund) as of the date of each accounting year of the Trust and as of the last business day of each calendar month during the accounting year of the Trust (each of which dates is referred to herein as a "valuation date"). For purposes of this Section, the close of any accounting year of the Trust shall be deemed to be the last day of the year on which the New York Stock Exchange is open for trading, and the last business day of each calendar month shall be deemed to be the last day of each month on which the New York Stock Exchange is open for trading. In determining the total value of such assets as of any valuation date, the Trustee shall appraise them at their market value of such date, and shall give effect to all income, profits or losses and increases or decreases in the value of each

separate fund. All items of income and expense shall be taken into account on an accrual basis. The Trustee shall exclude from such valuation any allocation to any separate fund with respect to the Employer contribution under the Profit Sharing Plan for the immediately preceding year, if the valuation date occurs before the Employer contribution has been paid in full and credited to Participants' accounts under the Profit Sharing Plan. The Trustee shall also exclude from any valuation the amount of any employee contributions payable by the Employer under the Profit Sharing Plan to the Trustee as of such valuation date. Following the determination of the value of the assets held in each separate fund as of any valuation date, the unit value as of such valuation date shall be determined in accordance with the next paragraph.

(b) The determination of the unit value of each separate fund as of any valuation date shall be made by dividing the total value of the assets in each separate fund, as determined by the Trustee in accordance with the preceding paragraph, by the number of units in each separate fund credited to the Accounts of all Participants under the Profit Sharing Plan and the Transitional Retirement Accounts. On any valuation date a uniform change may be made in the value of all outstanding units in any of the separate funds, either by crediting a larger number of smaller units or a smaller number of larger units. In such cases, the separate fund shall be credited with the equivalent number of units.

(c) The value of a Member's Transitional Retirement Account on any date shall be the number of units in the General Fund credited to such

Account on such date times the unit value as of the valuation date immediately preceding or coincident with such date, plus the value of any insurance contracts held for his benefit.

(d) Payments of Transitional Retirement Account values from the Plan shall be made as follows, as the context requires:

(1) For Members whose last day of employment prior to retirement, termination of employment or death occurs during the first fifteen days of a month, payments from the General Fund shall be made based on the valuation date as of the end of the month prior to the month which immediately precedes such event.

(2) For Members whose last day of employment prior to retirement, termination of employment or death occurs between the sixteenth and last day of a month, payments from the General Fund Fund shall be made based on the valuation date as of the end of the month immediately preceding such event.

(3) Payments from the Guaranteed Fund shall be made based on the balance as of the most recently available valuation date plus interest at the then effective rate of interest for the Guaranteed Fund calculated up to the estimated date of payment of a hardship or discretionary withdrawal, or the last day of employment prior to retirement, termination of employment or death, as the case may be.

Section 17.4. Insurance Contracts. (a) The Trustee shall continue to hold the life insurance contracts which Members have elected to have continued either on a premium paying or paid-up basis under the provisions of the Salaried Plan in

effect prior to January 1, 1964. For purposes of the Plan the term "life insurance contracts" shall mean ordinary life insurance contracts.

(b) Each unmarried Member for whom a life insurance contract or contracts are held shall have the right, except to the extent otherwise provided by any qualified domestic relations order to designate and thereafter at any time change the beneficiary or beneficiaries who upon his death shall be entitled to receive benefits under such contract or contracts. In the absence of an effective designation of a beneficiary or beneficiaries, such benefits shall be paid to the Member's estate in a lump sum. Each Member shall also have the right to designate and from time to time change the method of payment to such beneficiary or beneficiaries.

The spouse of each married Member for whom a life insurance contract or contracts are held shall, except to the extent otherwise provided by any qualified domestic relations order, be the beneficiary under such contract or contracts unless such spouse consents to the selection of another beneficiary. In addition, a married Member may change his designation of beneficiary from time to time only with the consent of the Participant's spouse.

(c) Dividends on contracts shall be applied in payment of premiums in the year in which such dividends are paid or credited. However, in the case of paid-up contracts, or where dividends exceed premiums, dividends shall be, in the discretion of the Plan Administrator, either credited to the Transitional Retirement Account of the Member on whose life the contract is issued or allowed to accumulate at interest with the issuing company.

Post mortem dividends shall be paid to the person or persons entitled to the death benefits under the contract on which such dividends are paid.

(d) The Trustee shall pay to the insurance company the amount of any premium due on a contract or contracts held by the Trustee, provided, however, that only an amount equal to the credit balance in the Transitional Retirement Account of a Member (excluding the cash surrender value of the contracts) shall be used to pay premiums under the contracts on his life.

The Trustee shall pay any premium for insurance on the life of a Member from the accumulated funds credited to his Transitional Retirement Account (excluding the cash surrender value of the contracts); and a number of units equal to the amount so paid shall be debited to his Transitional Retirement Account and canceled.

(e) Notwithstanding any other provision of this Plan, at no time shall any amounts be invested in or used to pay premiums on any life insurance contract for any Member if the total amount invested in life insurance coverage for him under this Plan will equal or exceed fifty percent of the allocations to his Transitional Retirement Account (including forfeitures) from his years of participation under the Salaried Plan. If at any time the payment of the premium on any life insurance contract or contracts held for the benefit of a Member would violate the provisions of the preceding sentence, or if a credit balance of the Transitional Retirement Account of a Member is no longer sufficient to pay a premium due on any life insurance contract, the Plan Administrator shall direct the Trustee to convert all

or any part of any such contracts to paid-up life insurance contracts.

(f) No insurance company shall be required to take cognizance of the provisions of this Plan or of the Agreement of Trust entered into to fund the benefits hereunder or to question the authority of the Trustee to do any act with respect to any policy or contract hereunder. The responsibility of the insurance company is limited to the terms of any contract or contracts it may issue. Any insurance company may conclusively assume that the Trustee, including any successor or successors in trust, has full power and authority to take any action which it has taken or proposes to take with respect to any policy or contract hereunder and has permission to receive and receipt for any money coming due and payable to said Trustee under any of said policies or contracts.

(g) The issuing company shall not be obliged to recognize or deal with, or to receive or consider requests or instructions from, any person or persons, or corporation other than the Trustee.

Any issuing company shall be fully discharged from all liability for any amount paid by it to the Trustee or paid in accordance with the direction of the Trustee, and no such issuing company shall be obliged to see to the distribution or application of any monies so paid by it.

Section 17.5. Vesting of Transitional Retirement Account. A Member's nonforfeitable interest in his Transitional Retirement Account shall be determined in accordance with the terms of the Salaried Plan in effect as of December 31, 1989.

ARTICLE 18

Cash Balance Retirement Accounts

Section 18.1. Establishment of Cash Balance Retirement Accounts. Effective as of January 1, 1990, there shall be established for each Member an account to be known as the "Cash Balance Retirement Account." Each Member's Cash Balance Retirement Account shall be credited with an opening balance equal to the Member's Retirement Account under the Salaried Plan, if any, valued as at December 31, 1989, plus the Employer contribution to the Retirement Account under the Salaried Plan with respect to the calendar year ended December 31, 1989, provided that for the purposes hereof, with respect to those Members who were "Principals" and "Associates" of Xerox Development Corporation, it shall be assumed that the Member's Retirement Account included any amounts which would have been contributed had the Member been a Participant in the Profit Sharing Plan on July 1, 1977, or the first date such Member would have otherwise been eligible to commence participation in the Profit Sharing Plan, whichever is later.

Section 18.2. Employer Credits. On December 31 of each calendar year that a Member is an Employee, the Employer shall credit such Member's Cash Balance Retirement Account with an amount equal to 5% of such Member's compensation for such calendar year. In the event that an Employee's employment terminates prior to December 31 of a year, the Member shall be entitled to an Employer credit pursuant to the provisions of Section 18.4.

Section 18.3. Rate of Interest. Beginning January 1, 1990, the balance in each Member's Cash Balance Retirement Account shall be credited with an annual rate of interest equal to the average of the beginning of the month yields for one-year Treasury bills for the twelve months of the preceding calendar year, plus 1 % (the "Interest Rate"). In the event the rate as so calculated shall decline more than two percentage points from the Interest Rate of the preceding year, the new interest rate shall be equal to the prior year's Interest Rate, minus two percentage points.

Section 18.4. Valuation. Valuation of each Member's Cash Balance Retirement Account shall be made based on the balance as of the date of the Employer credit pursuant to Section 18.2 immediately preceding retirement, termination of employment or death, as the case may be, plus interest at the then effective Interest Rate calculated up through the last day of employment prior to retirement, termination of employment or death, as the case may be. Such Members shall also have added to the value of the Cash Balance Retirement Account calculated pursuant to the preceding sentence an Employer credit equal to 5% of such Member's compensation from the beginning of such year through the last day of employment.

Approved this 2nd day of October, 1989.

XEROX CORPORATION

By /s/
Senior Vice President

ATTEST

/s/
Assistant Secretary

XEROX

PLANNING FOR A SECURE RETIREMENT

* * * * *

The Retirement Program

Two plans comprise the Xerox retirement program: the Retirement Income Guarantee Plan, and the Xerox Profit Sharing and Savings Plan. In addition, Xerox funds a major capital accumulation opportunity for employees through the Employee Stock Ownership Plan, although this plan is not a formal part of the retirement program.

Retirement Security and Individual Accounts.

The Xerox retirement program combines the advantages of defined benefit plans and individual accounts.

A defined benefit plan specifies, usually in a formula, the benefit payable to retirees. The company maintains assets in a separate trust fund. And the company -- not the employee -- bears the risk associated with the investment of the fund's assets. That makes pension plans more expensive for companies to fund and manage.

The pension benefit can never be less than that specified by the formula -- a real advantage, particularly to long-service employees, because the formula is very sensitive to years of service. But a straight pension benefit can never be more than what the formula yields. That can be a disadvantage, especially to short-service employees.

For short-service employees, the individual account typically yields a higher benefit than the formula.

The Xerox retirement program is a hybrid plan, combining the features of the defined benefit plan and individual accounts. In the Xerox retirement program, the defined benefit is backed by individual accounts. If your individual account would provide a benefit greater than the benefit yielded by the retirement income guarantee formula, you will receive the higher amount.

Each employee has a cash balance retirement account, which always increases; it can never suffer negative investment results. This account grows at a fixed annual rate. This annual rate, which will be determined before the beginning of the year and which will vary from year to year, is based upon the prior calendar year's average yield of the one-year Treasury bill. Specifically, the interest rate will be calculated by averaging the one-year Treasury bill yield as of the first business day of each of the 12 months for the prior calendar year, plus one percent. In addition, your account will be credited annually with an amount equal to 5 percent of previous year's pay.

Employees who were eligible for profit sharing in 1989 also will have a transitional retirement account. The value of this account varies -- up or down -- depending on investment results of the General Fund or Guaranteed Fund. The benefits that would be provided by the transitional retirement account will be compared with both the benefits provided by the cash balance retirement account and retirement income guarantee. The

employee will receive whichever yields the greatest benefit.

If you leave the company after becoming vested (five years service), you are entitled to take your benefit with you. You can roll over your benefit into an IRA when you leave, making your Xerox retirement benefits "portable."

Capital Accumulation.

Employees can build capital for their retirement by saving in the Xerox Profit Sharing and Savings Plan. If ROA is 10 percent or greater, the company will make an optional profit sharing contribution, which employees can defer in their company savings accounts or take in cash.

Xerox offers employees both a stake in the company and a way to build capital through the new Employee Stock Ownership Plan (ESOP).

How the Xerox Plans Stack Up.

Each year a national benefits consulting organization prepares an independent evaluation of benefit plans for Xerox and other clients. The result is a "benefit index," which shows how Xerox plans rank when compared with those of benchmark companies. Fourteen companies, including Kodak, IBM, Digital Equipment, Hewlett-Packard and AT&T, make up the comparison group.

Xerox asked the consultants to recalculate the index, based on the 1989 changes in the retirement program and the introduction of the ESOP. The chart on the next page shows how the changes have improved the ranking of the Xerox plans. The Xerox

plans rate at or near the top of the comparison group:

- The Retirement Income Guarantee Plan ranks second
- The combination of the Retirement Income Guarantee Plan and the Employee Stock Ownership Plan (capital accumulation) ranks third
- Long-term security (a composite rating of retirement benefits) ranks third
- Optional profit sharing ranks third when ROA is 13 percent; and second when ROA is 15 percent.

* * * * *

Retirement Income Guarantee Plan

The Retirement Income Guarantee Plan is designed to help assure your future financial security by providing a lifetime income to you and your spouse, if you are married, when you retire from Xerox. The plan also may provide benefits if you leave Xerox before retirement.

Social Security retirement benefits are paid by the government in addition to your Xerox retirement income.

How the Retirement Income Guarantee Plan works and what it can mean to you and your family is described in this section.

Eligibility.

As an employee of a Xerox participating company, you participate in the Retirement Income Guarantee Plan on your first day of work.

Cost.

The company pays the entire cost of providing your retirement income guarantee.

Retirement Dates.

You are eligible to retire when you have reached age 55 and completed 10 years of service.

Normal retirement is the first day of the month after you reach age 65 (or your 65th birthday, if it occurs on the first of the month). Deferred retirement -- after age 65 -- also permitted.

Your retirement income guarantee will be based on your age, your highest-average pay and your years of service.

Retirement Income Guarantee.

When you retire from Xerox, the company guarantees to pay you whichever provides you with the greatest retirement benefit from these sources:

- Your benefit under the retirement income guarantee formula (1.4% X highest-average pay X years of service, up to 30 years and adjusted for early retirement, if necessary), or
- Your cash balance retirement account, or
- Your transitional retirement account, if any.

If you are eligible for benefits from other Xerox retirement plans, including predecessor plans, your benefit from the Retirement Income Guarantee Plan could be reduced to account for the income you will be receiving from those plans. The amount you receive may also be reduced if you had previously left the company and received a distribution at that time; or if Xerox has accepted a qualified domestic

relations order (see page 2.18) to distribute a portion of your funds to an alternate payee.

Highest-average pay means the average of your pay during your five best paid calendar years with Xerox after 1974; these years need not be consecutive. For purposes of the retirement program, your pay equals your base pay, overtime, bonuses, commissions and lump sum wages (except salary continuance paid as a lump sum), up to the federally mandated limit of $200.000. (This maximum may be indexed in the future.)

The term service, as used in the formula, basically includes all your years of employment with Xerox up to a maximum of 30 years. Not included are service before January 1, 1976, if you left the company prior to that date and returned after that date; service with subsidiaries that have not adopted the retirement program; or service in collective bargaining units not participating in the retirement program (other than the ACTWU). If you are uncertain about any of your service, check with your personnel representative.

Example 1: Retirement at age 65 with 30 years of service.

Suppose you retire at age 65 with 30 years of service, and your highest-average pay is $30,000. Here's how your retirement income guarantee would be calculated:

1.4% X $30,000 X 30 = $12,600

If you add the Social Security benefit that you would receive from the government (according to 1989

Social Security schedules), you'll have a combined annual income of $22,872.

Example 2: Retirement at age 65 with fewer than 30 years of service.

Assume, as in example 1, that you retire at age 65. and your highest-average pay is $30,000. Instead of 30 years service, however, you retire with 24 years. Here's how your retirement income guarantee would be calculated:

1.4% X $30,000 X 24 = $10,080

With 1989 Social Security benefits, you would have a combined annual income of $20,352.

Example 3: Early retirement.

Early retirement is defined as retirement after reaching age 55 and before age 65. If you retire early and you have fewer than 30 years service, your retirement benefits will be reduced by 1/12 of 5 percent for each month of your age before age 65. With 30 years of service, your retirement benefits will be reduced by 1/12 of 5 percent for each month before age 62.

Suppose you are 60 years old, your highest-average pay is $30,000 and you have 24 years service. You are retiring 60 months before normal retirement age (5 years X 12 months = 60 months). The early retirement reduction would be:

1/12 X 5% X 60 = 25%

Your retirement income guarantee would be:

1.4% X $30,000 X 24 = $10,080 - (25% X $10,080) = $7,560

You would not be eligible for Social Security benefits until age 62 at the earliest. The 1989 estimated Social Security benefit payable at age 62 is $8,424.

Example 4: Alternate computation method.

People with exceptionally long service may receive a higher income from an alternative method of arriving at the retirement benefit. The alternate method is simply 1 percent of your highest average pay times your years of service. (The 30-year service maximum does not apply to the alternate formula.) The early retirement reduction will be applied if you elect to receive your benefits before age 65 (or age 62 with 30 or more years of service).

Suppose your highest-average pay is $30,000 and you retire at age 65 with 44 years service. Using the alternate method, your retirement income guarantee would be:

1% X $30,000 X 44 = $13,200

In this case the alternate method yields a higher benefit than the pension formula (1.4% X $30,000 X 30 = $12,600).

Table for Estimating Retirement Income Guarantee

Find the percentage below for your age and service anniversary. Multiply that percentage times your highest-average pay. The answer is an estimate of your retirement income guarantee from Xerox. (All entries in the table below are percentages.)

Retirement Age

Service	55	56	57	58	59	60	61	62	63	64	65
30	27 3	29.4	31.5	33.6	35.7	37.8	39.9	42.0	42.0	42.0	42.0
29	20.3	22.3	24.4	26.4	28.4	30.4	32 5	34.5	36.5	38 6	40.6
28	19.6	21.6	23.5	25.5	27.4	29.4	31.4	33.3	35 3	37.2	39.2
27	18 9	20 8	22.7	24 6	26 5	28 4	30.2	32.1	34 0	35.9	37.8
26	18.2	20.0	21.8	23.7	25.5	27 3	29.1	30.9	32.8	34.6	36.4
25	17.5	19.2	21.0	22.8	24.5	26 2	28.0	29.8	31.5	33.2	35.0
24	16 8	18.5	20.2	21.8	23.5	25.2	26.9	28.6	30.2	31.9	33.6
23	16.1	17.7	19 3	20.9	22.5	24.2	25.8	27.4	29.0	30.6	32 2
22	15.4	16.9	18.5	20.0	21.6	23 1	24.6	26 2	27.7	29.3	30 8
21	14.7	16.2	17 6	19.1	20 6	22.0	23.5	25 0	26.5	27.9	29 4
20	14.0	15.4	16.8	18.2	19 6	21.0	22.4	23 8	25.2	26 6	28.0
19	13.3	14.6	16.0	17.3	18 6	20.0	21.3	22 6	23 9	25 3	26.6
18	12 6	13 9	15.1	16.4	17 6	18 9	20 2	21.4	22.7	23 9	25.2
17	11.9	13.1	14.,3	15.5	16 7	17.8	19.0	20.2	21.4	22.6	23.8
16	11 2	12.3	13.4	14.6	15.7	16.8	17.9	19.0	20 2	21.3	22.4
15	10.5	11.6	12.6	13.6	14 7	15.8	16.8	17 8	18.9	20.0	21.0
14	9 8	10.8	11.8	12.7	13 7	14.7	15.7	16.7	17.6	18.6	19.6
13	9.1	10.0	10.9	11.8	12.7	13.6	14 6	15.5	16.4	17.3	18.2
12	8.4	9.2	10.1	10.9	11 8	12.6	13 4	14.3	15.1	16 0	16.8
11	7.7	8.5	9.2	10.0	10.8	11.6	12.3	13.1	13.9	14 6	15.4
10	7.0	7.7	8.4	9.1	9 8	10.5	11.2	11.9	12.6	13 3	14 0

Enhanced Retirement Benefit.

Employees who reached age 50 and completed 10 years service by December 31, 1986, may be entitled to an enhanced retirement income guarantee, described in other communications.

Your Cash Balance Retirement Account.

All employees will have a cash balance retirement account. Your profit sharing retirement account balance under the profit sharing plan as of December

31,1989, will be transferred to the Retirement Income Guarantee Plan. The December 31, 1989 balance of your profit sharing retirement account will be credited to a new cash balance retirement account established as of January 1, 1990. In 1990, this account will be credited with the 1989 profit sharing retirement account contribution, based on ROA for 1989.

The value of your cash balance retirement account will grow in two ways. First, Xerox will credit your cash balance retirement account annually with an amount equal to 5 percent of your pay. This credit, which will begin with a credit for 1990 made in 1991, is independent of ROA.

Second, Xerox will credit your cash balance retirement account with interest earned at a fixed annual rate. This annual rate, which will be determined before the beginning of the year and which will vary from year to year, is based upon the prior calendar year's average yield of the one-year Treasury bill. Specifically, the interest rate will be calculated by averaging the one-year Treasury bill yield as of the first business day of each of the 12 months for the prior calendar year, plus one percent.

There is no limit on the cash balance retirement account's rate of return in the event that the average yield of the one-year Treasury bill increases in succeeding years. In the event that the average yield of the one-year Treasury bill drops, however, the rate of return credited to your cash balance retirement account will not drop by more than 2 percentage points from one year to the next.

Your Transitional Retirement Account.

At the same time that your cash balance retirement account is established, a second, called the transitional retirement account, will also be set up in your name under the Retirement Income Guarantee Plan. Employees who were eligible for profit sharing in 1989 and receive a profit sharing retirement account contribution for 1989 will have a transitional retirement account.

The transitional retirement account will track your opening balance -- the December 31, 1989, profit sharing retirement account balance, plus the retirement account contribution for 1989 -- according to the investment of your profit sharing retirement account as of December 31, 1989. Although the transitional retirement account will no longer receive annual contributions, it may yield a larger balance than the cash balance retirement account, depending on the funds' rates of return.

An Individual Account.

Having an individual account offers several advantages:

- It may provide you with a cash payment of your full account balance if you are vested and leave Xerox before qualifying for retirement. (See page 2.10 for an explanation of vesting.) This money may be deposited into an Individual Retirement Account (IRA) within 60 days. For other payment options you can elect, see the section on settlement, page 2.13.
- It provides a cash payment to your spouse or other beneficiary if you die before you are eligible for retirement.

Security.

All private retirement plans are covered by federal legislation known as ERISA -- the Employee Retirement Income Security Act. That law was designed to protect the pension benefit earned by employees during their careers.

The assets of the Retirement Income Guarantee Plan are held by the fund's trustee, State Street Bank and Trust Company of Boston. The trustee holds plan assets separate and apart from all company money or assets of any kind. ERISA and trust provisions specify that trust funds are for the sole benefit of plan participants and cannot be used for the benefit of the company. The company cannot withdraw money from the plan, or borrow from or against the plan.

ERISA requires that Xerox make annual payments to the trust fund to ensure that there are sufficient assets to meet pension liabilities. These payments are based on independent actuarial calculations and must meet ERISA requirements.

In the event of a bankruptcy, the company's creditors do not have rights to plan assets. If the plan were terminated, Xerox could withdraw only those assets in excess of those required to fund benefit liabilities. Advance notice to participants would be required for any such withdrawal. In the event of plan termination following a change in control, assets in excess of those required to fund benefit liabilities would be automatically allocated to plan participants. This provision means that there would be no financial incentive for a new owner to terminate the plan following a takeover.

In addition to these restrictions, Xerox is required by law to pay annual premiums to the Pension Benefit Guaranty Corporation (PBGC). Payment of this premium ensures that your benefit would be paid, up to the limits on PBGC coverage, in the event the plan should terminate and does not have sufficient funding.

No Withdrawals.

Because the basic purpose of the retirement account(s) is to provide you and your spouse a lifetime income at retirement, no loans or withdrawals are permitted from your account(s) for any reason other than payment of vested amounts if you leave the company.

Vesting.

Vesting means that an employee has earned benefits that the employer cannot revoke, even if the employee terminates. When you become vested in the Retirement Income Guarantee Plan, for example, you have a right to the balance of your individual account or your retirement income guarantee.

You become 100 percent vested in the Retirement Income Guarantee Plan on the day before your fifth service anniversary. Once you reach age 65, you are 100 percent vested in the plan, regardless of your years of service.

You also are 100 percent vested in your individual account(s) if you should die before retirement, in which case your beneficiary or your estate will receive your full account balance.

If you leave Xerox after you are vested, you are entitled to take your account balance. If the value of

your accrued benefit under the pension formula (reported in your annual benefit statement) is greater, you are entitled to the larger benefit. If you leave Xerox before becoming vested, you forfeit your individual account balance(s) and any benefit accrued under the retirement income guarantee.

If you leave Xerox after January 1, 1985, and are then rehired, any benefit you forfeited when you left will be restored when you return - provided you missed less than five full years following your termination of employment. If you missed five or more full years, the forfeited money will not be restored.

Annual Benefit Statements.

Each year you receive a personalized statement that describes:

- The value of your individual retirement accounts,
- Your accrued retirement income guarantee that you would receive at age 65,
- The value of your ESOP account,
- The value of your savings account(s),
- The approximate income that your survivors would receive in the event of your death.

XEROX

Value Added

To Your 1990 Compensation

Your Personal Benefits Statement

* * * * *

Introduction

This statement summarizes what Xerox benefits were worth to you personally over the past year and reflects the benefit elections you made last fall. It also includes information on the new retirement program and the Employee Stock Ownership Plan (ESOP).

Effective January 1, 1990, when you retire from Xerox, the company guarantees to pay you whichever of the following provides you with the greatest benefit: your cash balance retirement account (CBRA); your transitional retirement account (TRA) (if applicable); or your benefit under the pension formula. Your current CBRA and TRA (if applicable) balances, and your accrued monthly benefit at age 65 under the pension formula, are provided on pages 8-9 of this booklet.

To establish your CBRA, your December 31, 1989 profit sharing retirement account balance was transferred to the Retirement Income Guarantee Plan (RIGP) and credited to your new CBRA on January 1, 1990. This account was also credited with the 1989 profit sharing retirement account contribution. At the same time that your CBRA was established, your TRA was also set up under the

Retirement Income Guarantee Plan. The TRA tracks your opening balance – the December 31, 1989 profit sharing retirement account balance, plus the retirement account contribution for 1989 – according to the investment of your profit sharing retirement account as of December 31, 1989. For more information on the new retirement program, see *You and Xerox* or the *Planning for a Secure Retirement* booklet (December 1989).

For 1989, the total contribution to profit sharing was 7.3 percent (5.6 percent of which was made to RIGP and 1.7 percent of which was optional profit sharing). This percent was determined by our Return on Assets (ROA), the ratio of profits to assets. ROA for 1989 was 12.4 percent. For details on profit sharing or the ROA calculation, see the inside back cover of this report. Pages 6-7 provide your savings account fund balances, and your 1989 optional profit sharing election and amount. For information on the performance of the three savings funds – the General Fund, the Guaranteed Fund and the Xerox Stock Fund – go to page 5. Be sure to see *You and Xerox* for additional details on savings options, hardship and discretionary withdrawals, and loan regulations.

The ESOP was adopted in July for eligible U.S. salaried employees in Xerox participating companies. See pages 6-7 for more information on this benefit.

We've made every effort to make sure this report is accurate and up-to-date. However, if you spot an error, please bring it to the attention of your personnel representative.

Remember, this report provides estimates of benefits to help you understand how our benefit program

might work for you. Eligibility for benefits and the actual amounts payable are determined by the specific benefit plans. In the event of a discrepancy between the information provided in this booklet and the official plan documents, the plan documents are controlling.

This text and your personal entries in this statement was printed on the Xerox 9700 electronic printing system.

When You Retire

Your Retirement Benefit

When calculating your retirement benefit, Xerox will compare the value of three separate sources for benefits. The benefit that is provided by the transitional retirement account, if applicable, will be compared with both the benefit provided by the cash balance retirement account and the pension formula benefit. You will receive whichever yields the greatest benefit.

The Xerox retirement program is a unique program, combining the features of defined benefit plans and individual accounts.

Your Individual Retirement Accounts

Every eligible employee has a cash balance retirement account (CBRA). This account grows at a fixed, annual rate. It can never suffer negative investment results. Your balance on February 28, 1990 was $9,900. The chart on page 9 shows your account in detail. You are 100% vested in your CBRA.

Employees who were eligible for profit sharing in 1989 will also have a transitional retirement account

(TRA). The value of this account varies -- up or down -- depending upon the rates of return for the funds where your monies are invested. Your total balance on February 28, 1990 was $9,845. The chart on page 9 shows your account in detail. You are 100% vested in your TRA.

Your Pension Formula Benefit

Your pension formula benefit is a defined benefit, meaning that the pension you may receive can never be less than the formula. The formula benefit is 1.4% x your highest average pay x your years of service, up to 30 years. This benefit would be reduced for early commencement of retirement benefits.

If you left the company as of February 28, 1990, with a vested benefit based on your current salary level and years of service, you would be entitled at age 65 to a monthly benefit of $1,281. This benefit will grow as your length of service (up to 30 years) and your earnings increases. You are 100% vested in this accrued benefit.

Your account balances may contain the value of distributions which you may have already received if you left the company previously and took a distribution from the plan, and were then rehired by the company.

Your guarantee may be reduced by benefits payable from other Xerox retirement plans or by distributions you have already received.

Retirement Plan Individual Account Balances

TRANSITIONAL RETIREMENT ACCOUNT

GENERAL FUND		
Previous Balance 02/28/89	$4,848.26	
Investment Results 02/28/89 - 12/31/89	$694.07	
Forfeiture Allocation	$9.16	
Transfers		
Investment Results 01/01/90 - 02/28/90	-$168.81	
Contributions	$4,262.28	
Subtotal General Fund		$9,645.16
GUARANTEED FUND		
Previous Balance 02/28/89		
Investment Results 02/28/89 - 12/31/89		
Forfeiture Allocation		
Transfers		
Investment Results 01/01/90 - 02/28/90		
Contributions		
Subtotal General Fund		
TRA TOTAL BALANCE 2/28/90		**$9,645.16**
TRA VESTED BALANCE		**$9,645.16**

CASH BALANCE RETIREMENT ACCOUNT

Start-Up Balance	$5,561.49	
Interest 01/01/90 - 02/28/90	$86.72	
Credits	$4,262.28	
CBRA TOTAL BALANCE 2/28/90		**$9,900.49**
CBRA VESTED BALANCE		**$9,900.49**

You will receive whichever yields the greatest benefit: your transitional retirement account (if applicable) or your cash balance retirement account or your pension formula benefit.

THE DOCUMENT COMPANY
XEROX

Internal Memo

To:	From:
Patricia M. Nazemetz **Director, Benefits,** **Corporate Human** **Resources**	**Paul Frommert** **QA/QC Manager** **CSS/EOPM** **208-07F - 8*222-5136** **MS Mail: Paul** **Frommert@XN.Xerox**
Subject: Benefits	Date: September 17, 1996

I have recently become aware that my retirement benefit numbers in my value added statement do not represent my true retirement benefits. In fact, in my case, the benefits would be $5.31 per month vs. $2,482.00 as stated in my 1996 value added report.

It appears that for employees who had left Xerox and subsequently, been rehired, there essentially is no retirement benefit due to the "phantom" account which continues on paper. If this is so, it means that we are being treated differently from both new employees and tenured employees.

The news came as a shock since I believed the number in the value added statements year over year. There have to be a good number of Xerox employees who are in this situation and I would bet most of them are unaware of this.

When considering I had a very successful career at Xerox for twenty-five years, left for approximately three years, was approached by Xerox and hired back to establish a Quality organization for the XES division, it is extremely disconcerting to find out I am being treated - no retirement - in a manner different from new hires who, in many ways, are unproven entities to Xerox and from those who had remained at Xerox.

I would like very much to meet with you and discuss this situation. I haven't calculated what my benefits would be if I had been trained as a new employee upon my rehire, but I would guess I would be much better off than the current situation.

I find it hard to believe that a corporation like Xerox would knowingly have a benefits program that treats people in my category in this manner. It is morally unsound.

I know of many other employees who have been rehired who also are very concerned.

Would you please respond, and if possible a meeting could be arranged with you in Rochester to discuss this matter further and determine next steps. This current situation virtually makes it impossible for us to consider retirement at a future date.

Sincerely,

Paul Frommert

THE DOCUMENT COMPANY
XEROX

Arlyn B. Kaster
Manager, Employee Pension & Life Insurance Programs
Total Pay Programs - Stamford
Corporate Human Resources

June 23, 1999

Mr. Alan H. Clair
5 Windward Drive
New Fairfield, CT 06812

Dear Mr. Clair:

Your memo to Patricia M. Nazemetz, dated June 14, 1999, concerning the offset of prior distributions under the retirement plan has been forwarded to me for review and response. In my capacity as Manager, Employee Pension and Life Insurance Programs, I have operational responsibility for certain of the Xerox Benefits Programs which Include the Xerox Corporation Retirement Income Guarantee Plan ("RIGP"), the Xerox Profit Sharing & Savings Plan ("PSSP"). the Employee Stock Ownership Plan ("ESOP") and overall responsibility for the Xerox Benefits Center. I have reviewed the issues as outlined in your letter and the terms of the governing plan and I have determined that our plan benefit is being calculated correctly, as provided by the terms of the official plan document

As an initial matter, you should be aware that there has been no change to the offset mechanism under RIGP. There has been an offset of prior distributions

along with hypothetical investment gains attributable to such amount, as though it had remained invested under the plan, going back to the inception of RIGP. Prior to 1990, when RIGP was redesigned, the Retirement Account was an account under the Profit Sharing Retirement and Saving Plan (the PSP). This account was always used as an offset to any benefit payable under RIGP and, if there was a prior distribution from this account, it was offset along with any gains it would have realized if it remained invested under the Plan.

With the redesign in 1990, the Retirement Account (along with prior distributions and hypothetical investment gains) was simply moved over to RIGP which was renamed the Transitional Retirement Account and at which time the CBRA account was added.

Secondly, I would like to explain the purpose and justification of this long-standing offset of prior distributions, along with investment gains that would have accrued had the money been left in the plan. If there were no offset for prior distributions, the Company would be paying a greater benefit in actual dollars to the employee who left the Company and then returned since the Retirement Account (now the TRA) is and always has been the funding mechanism for the RIGP benefit; and, if the prior distribution had been left in the account, the investment results attributable to the amount distributed would have helped to fund the ultimate benefit received by the participant. Without offsetting for such hypothetical investment returns, the Company would need to contribute an amount equal to the gains that would have otherwise been

earned in the account and this would result in the Company funding a greater amount for the employee who terminated and took a distribution than for the employee who remained in the employ of the Company. Consequently, the Plan offsets the investment returns because that is money that would have been available to fund the RIGP benefit as well.

RIGP is governed by the Employee Retirement Income Security Act of 1974 (ERISA) and ERISA requires that I quote from the relevant plan provisions which serve as the basis of this denial of your claim for additional RIGP benefits. Historically. RIGP has provided at Section 4.2 of the plan document that the RIGP benefit would be reduced by the amounts payable from the "Retirement Account"; and, as you can see from the definition of "Retirement Account" as set forth in the historical definition section of RIGP and which is set forth below, this has always included the prior distribution as it would have grown had it remained in the plan.

> *Retirement Account. The Member's account balance in his Retirement Account maintained under the Profit Sharing Plan at the time as of which the calculation of an accrued benefit under the Plan is determined ("relevant time'). Where a Member has received a distribution from his Retirement Account prior to the relevant time (other than a lump sum payment made under Section 8.5 of the Plan), it shall be assumed that his actual Retirement Account balance at the relevant time includes an amount equal to the sum so distributed as it would have increased or decreased during the*

period from the time of the distribution to the relevant time if such sum had been invested in the General Fund under the Profit Sharing Plan in which the Member participated at the time of the distribution.

The following sections of RIGP, as presently in effect, basically mirror the above-cited provisions and are applicable where there has been a prior distribution of benefits.

Sections 1.8 and 1.38 establish accounts for CBRA and TRA, respectively, which reflect amounts previously distributed. This accounting is for the purpose of determining whether the formula benefit is higher than CBRA or TRA.

Sections 1.8 Cash Balance Retirement Account. "....Where a Member has received a distribution from his Cash Balance Retirement Account prior to the relevant time, it shall be assumed that his actual Cash Balance Retirement Account balance at the relevant time includes an amount equal to the sum so distributed as it would have increased during the period from the time of the distribution to the relevant time if such sum had continued to be invested in the Cash Balance Retirement Account...."

Section 1.38 Transitional Retirement Account "...Where a Member has received a distribution from his Transitional Retirement Account prior to the relevant time, it shall be assumed that his actual Transitional Retirement Account balance at the relevant

time includes an amount equal to the sum so distributed as it would have increased or decreased during the period from the time of the distribution to the relevant time if such sum had continued to be invested in the Separate Fund (as defined under the Profit Sharing Plan) or the Segregated Assets Fund, in whichever the Member participated at the time of the distribution...."

Section 1.43 of RIGP, as presently in effect, specifically relates to offsetting amounts previously distributed for purposes of the formula benefit. Section 1.43f, which is set forth in its entirety below, provides that prior years of participation will be reinstated if a Member again becomes active and the benefit payable will be reduced by the previously distributed amount with adjustments which reflect the sum so distributed as it would have increased during the period from the time of the distribution.

Sections 1.43(f) "No credit shall be given for any period with respect to which a lump sum payment has been made under Sections 8.2, or 8.5. Credit for Years of Participation preceding a payment under Sections 8.2 and 8.5 will be reinstated if a Member again becomes an Active Member. The benefit payable under this Plan to such Member who has received a prior distribution will be reduced by the previously distributed amount with adjustments to the 'relevant time' under Section 1.8 or 1. 38, or at the time of the subsequent distribution under Section 4.2."

Similarly, there has never been any intent to provide any duplicate plan benefits where Years of Participation have been restored. To the contrary, the plan document has provided, again since Its inception, that there would be no duplication of benefits and has always expressly provided for offsets to avoid such effect. Specifically, Section 9.6 of the plan reads in relevant part as follows:

> *Section 9.6. Nonduplication of Benefits. "In the event any part or all of a Member's accrued benefit is distributed to him or is segregated for the account of or distributed to a former Spouse as an alternate payee pursuant to a qualified domestic relations order prior to his Normal Retirement Date, [and such Member at any time thereafter recommences active participation in the Plan the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution."*

Finally, In addition to the terms of the plan document, the You & Xerox employee handbook and the annual Value Added Statement have referred consistently to this offset. In the summary plan descriptions, You & Xerox, which are required by ERISA, as well as in other employee communications, the RIGP benefit has been described in general terms. These have consistently referenced the offset for those employees who left the Company and received a prior distribution. For example, the offset was addressed in the following employee communications among others: 1981 You & Xerox page 77, 87-88 You & Xerox page 62; 1990

You & Xerox, page 67, and 1993 You & Xerox, page 112.

I hope the above explanation helps you understand that there has been no policy change regarding the calculation of RIGP benefits and to better understand how your benefit was determined under RIGP. As you can see and as is required by ERISA, your benefit from RIGP is administered as outlined in the RIGP plan document, and is administered consistently to all plan participants. This is a legal requirement and ERISA specifically prohibits exceptions.

If you wish to appeal this denial, you must do so in writing by submitting your appeal to the Plan Administrator. The Plan Administrator must receive your written request within 60 days of receipt of this letter. For specific information regarding your rights as a plan participant, please refer to "Your Rights Under ERISA" starting on page 71 of *You and Xerox: Benefits for Salaried Employees/WealthWise* employee handbook. Your request must be in writing and directed to Sally L. Conkright, Plan Administrator, at: Xerox Corporation, 800 Long Ridge Road, Stamford, CT 06904. The Plan Administrator will review your claim within 60 days (subject to extension under certain circumstances); you will receive a written response, explaining the reason for the decision, with specific reference to plan provisions on which the decision was based.

Sincerely,

Arlyn B. Kaster

ABK/pss/ctm

THE DOCUMENT COMPANY
XEROX

Sally L. Conkright
Plan Administrator

August 23, 1999

Mr. Alan H. Clair
5 Windward Drive
New Fairfeld, CT 06812

Dear Mr. Clair:

Your letter dated August 12, 1999 to Mr. Thoman was forwarded to me for review and is also in response to your appeal of the denial by Arlyn Kaster of your June 18, 1999 claim for additional benefits under the Xerox Corporation Retirement Income Guarantee Plan ("RIGP").

In my capacity as Plan Administrator for RIGP, I have reviewed the issues as outlined in your letter and the terms of the governing plan documents as well as the detailed response provided to you in Arlyn's June 23 letter, and your benefit calculation, and I have determined that your RIGP benefit is being calculated correctly, as provided by the terms of the official plan document.

Regarding your statement that "...if I was *rehired* on the same date as someone else was *hired for the first time* and we both worked for 20 years and made the same pay, than by all rights we should receive an identical retirement". Let me explain why prior distributions affect future pension benefits. Length of benefit service is a key factor in determining retirement benefits. Calculating and including the

current value of prior distributions puts employees who took a prior distribution on the same level as employees whose balances remained invested in the plan. Without this, adjustment, employees who took a prior distribution could receive higher (or lower) benefits than employees who had no prior distributions. This process ensures that the Company provides the same benefit dollars for employees with the same pay and benefit service - whether or not there was a prior distribution.

As Arlyn's letter stated, prior distributions have been provided for as an offset under RIGP since the inception of RIGP in 1977. Her letter further explained how prior distributions are calculated under the plan, i.e., your RIGP benefit will be offset by such prior distribution as it would have increased (or decreased) had it remained invested under the plan. The relevant plan provisions are set forth below.

You should be aware that RIGP is a qualified pension plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA requires that RIGP be administered strictly in accordance with its terms and further requires that RIGP be administered consistently as to all plan participants - without exception. The terms of RIGP specifically provide that any RIGP benefit payable to a participant who has received a prior distribution upon retirement or termination of employment shall be offset by the amount of such prior distribution as it would have grown had it remained invested under the Plan. This offset has been applied consistently as to all participants who left the Company and received a distribution who were later rehired by the

Company. There can be no exception or deviation since any such exception or deviation from the terms of the plan would violate ERISA.

If there were no offset for prior distributions, the Company would be paying a greater benefit in actual dollars to the employee who left the Company and then returned since, as noted, the Retirement Account (now the TRA) is and always has been the funding mechanism for the RIGP benefit; and such investment - results, if the prior distribution had been left in the account, would have helped to fund the ultimate benefit received by the participant. Without offsetting for such hypothetical investment returns, the Company would need to contribute an amount equal to the gains that would have otherwise been earned in the account and this would result in the Company funding a greater amount for the employee who terminated and took a distribution than for the employee who remained in the employ of the Company.

Consequently, the Plan offsets the investment returns because that is money that would have been available to fund the RIGP benefit as well.

In this way, all employees are, in fact, on an equal footing in terms of the dollars that the Company funds for a participant's RIGP benefit. Also, the potential for further disparity for the employee who remains in the employ of the Company is readily apparent when one considers the fact that the employee who left could have invested the prior distribution at the time of termination, had he or she so chosen. In addition, all prior years of participation are restored for purposes of calculating the formula benefit and the comparison with the

TRA and CBRA accounts. This, again, insures that all employees are treated the same whether or not they took a prior distribution.

I apologize if some of the following information appears redundant and repeats much of the information already included in Arlyn's response, however, ERISA requires that I explain the reason for my decision with specific reference to plan provisions on which the decision is based.

Historically, RIGP has provided at Section 4.2 of the plan document that the RIGP benefit would be reduced by the amounts payable from the "Retirement Account"; and, as you can see from the definition of "Retirement Account" as set forth in the definition section of RIGP and which is set forth below, this has always included the prior distribution as it would have grown had it remained in the plan.

Retirement Account. The Member's account balance in his Retirement Account maintained under the Profit Sharing Plan at the time as of which the calculation of an accrued benefit under the Plan is determined ("relevant time"). Where a Member has received a distribution from his Retirement Account prior to the relevant time (other than a lump sum payment made under Section 8.5 of the Plan), it shall be assumed that his actual Retirement Account balance at the relevant time includes an amount equal to the sum so distributed as It would have increased or decreased during the period from the time of the distribution to the relevant time if such sum had been invested in the General Fund under the Profit Sharing Plan in which the Member participated at the time of the distribution.

The following sections of RIGP, as presently in effect, basically mirror the above-cited provisions and are applicable where there has been a prior distribution of benefits.

Sections 1.8 and 1.38 establish accounts for CBRA and TRA, respectively, which reflect amounts previously distributed. This accounting is for the purpose of determining whether the formula benefit is higher than CBRA or TRA.

Sections 1.8 Cash Balance Retirement Account. " Where a Member has received a distribution from his Member's Retirement Account or Cash Balance Retirement Account prior to the relevant time, it shall be assumed that his actual Cash Balance Retirement Account balance at the relevant time includes an amount equal to the sum so distributed as it would have increased during the period from the time of the distribution to the relevant time if such sum had continued to be invested in the Member's Retirement Account prior to December 31, 1989 and thereafter in the Cash Balance Retirement Account...."

Section 1.38 Transitional Retirement Account. " Where a Member has received a distribution from his Retirement Account or Transitional Retirement Account prior to the relevant time, it shall be assumed that his actual Transitional Retirement Account balance at the relevant time includes an amount equal to the sum so distributed as it would have increased or decreased during the period from the time of the distribution to the relevant time ff such sum had been invested in the Separate Fund (as defined under the Profit Sharing Plan), in whichever the Member participated at the time of the distribution.... "

Section 1.43 of RIGP, as presently in effect, specifically relates to offsetting amounts previously distributed for purposes of the formula benefit. Section 1.43f, which is set forth in its entirety below, provides that prior years of participation will be reinstated if a Member again becomes active and the benefit payable will be reduced by the previously distributed amount with adjustments which reflect the sum so distributed as it would have increased during the period from the time of the distribution.

Sections 1.43(f) "No credit shall be given for any period with respect to which a lump sum payment has been made under Sections 8.2 and 8.5. Credit for Years of Participation preceding a payment under Sections 8.2 and 8.5 will be reinstated if a Member again becomes an Active Member. The benefit payable under this Plan to such Member who has received a prior distribution will be reduced by the previously distributed amount with adjustments to the "relevant time" under Section 1.8 or 1.38, or at the time of the subsequent distribution under Section 4.2."

Similarly, there has never been any intent to provide any duplicate plan benefits where Years of Participation have been restored. To the contrary, the plan document has provided, again since its inception, that there would be no duplication of benefits and has always expressly provided for offsets to avoid such effect. Specifically, Section 9.6 of the plan reads in relevant part as follows:

Section 9.6. Nonduplication of Benefits. "In the event any part or all of a Member's accrued benefit is distributed to him or is segregated for the account of or distributed to a former Spouse as an alternate

payee pursuant to a qualified domestic relations order prior to his Normal Retirement Date, [and such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution or segregation."

Also, the You & Xerox employee handbook and the annual Value Added Statement have referred consistently to this offset. In the summary plan descriptions (You & Xerox) which are required by ERISA, as well as in other employee communications, the RIGP benefit has been described in general terms. These have consistently referenced the offset for those employees who left the Company and received a prior distribution. For example, the offset was addressed in the following employee communications among others 1981 You & Xerox page 77, 87-88 You & Xerox page 62; 1990 You & Xerox, page 67, and 1993 You & Xerox, page 112.

The terms of RIGP clearly provide for the calculation of your RIGP benefit to include the offset of your prior distribution and hypothetical investment returns and such offsets have been consistently applied for other rehired employees who previously took a distribution. ERISA allows for no exceptions. Consequently, I must uphold Ms. Kaster's denial of your claim for benefits upon appeal. This represents a final decision of the Plan on this issue and, as such, you have no further appeal rights under the tams of the Plan.

Sincerely,

Sally L. Conkright

SLC/pss

Abar Pension Services, Inc.
PENSION, PROFIT SHARING, 401(K) PLAN
DESIGN AND ADMINISTRATION
June 22, 2006

MIKEL R. UCHITEL,
FSA, EA, SMPA
MARK SHEMTOB,
ASA, EA, MSPA
PHILIP D. COFIELD,
EA, MSPA
SCOTT M. FEIT, CPA,
QKA

25B VREELAND ROAD –
SUITE 209
FLORHAM PARK, NJ
07932-1900
(973) 660-2100
FAX: (973) 660-2111
abar@abarpension.com

Robert H. Jaffe, Esq.
Robert H. Jaffe & Associates, P.A.
8 Mountain Avenue
Springfield, New Jersey 07081

Re: *Paul J. Frommert, et al. v. Sally L. Conkright, et al.*
Civil Action No.: 00-cv-6311

Dear Mr. Jaffe:

You have asked Abar Pension Services, Inc. to analyze provisions of the 1989 Restatement of the Xerox Retirement Income Guarantee Plan ("RIGP Plan") to assist the court in determining the most equitable methodology to be used to calculate retirement benefits accrued by the named plaintiffs

in the above referenced Frommert action without imposition of a phantom account offset.[1] It is our understanding that this letter will be submitted to District Judge David G. Larimer in support of a memorandum the court directed you to submit on or before Monday, June 26, 2006.

As background information, you have provided our office with the following materials: (a) the 1989 Restatement of the Xerox RIGP Plan; (b) the December 1989 Summary Plan Description ("SPD") entitled "You and Xerox: Planning for a Secure Retirement" which describes the 1989 Restatement of the Xerox RIGP Plan; (c) the decision of the Second Circuit Court of Appeals in the case entitled Layaou v. Xerox, 238 F.3d 205 (2nd Cir. 2001); (d) the decision of Judge Larimer in the case entitled Layaou v. Xerox, 330 F. Supp.2d 297 (W.D.N.Y. 2004), hereinafter referred to as Layaou 2004; (e) the decision of the Second Circuit Court of Appeals in the case entitled Frommert v. Conkright, 433 F.3d 254 (2nd Cir. 2006); (f) the transcript of proceedings in the Frommert case held before District Judge Larimer held on May 30, 2006; (g) Statements of Information and supplementary materials received from named plaintiffs Alan H. Clair and Floyd D. Swaim relating

---

[1] As we understand it, the phantom account offset consisted of the appreciated value of the lump sum distribution previously received by the named plaintiffs in the Frommert action, which the Second Circuit declared could not be imposed upon rehired plan participants if they were rehired prior to September 1998.

to their claims for recalculation of their pension entitlements pursuant to provisions of the RIGP Plan and SPDs describing the 1989 Restatement; and (h) the Excel spreadsheets provided by the Xerox Plan Administrators setting forth information in their database relating to forty rehired plan participants who are plaintiffs in the Frommert action, including information relating to plaintiffs Clair and Swaim, all calculated as of March 1, 2006.

In our opinion, the most desirable and equitable methodology to calculate a rehired plan participant's entitlement to retirement benefits is the one described in Section 9.6 of the 1989 Restatement. This provision is captioned "Non-Duplication of Benefits" and states as follows:

> In the event any part of or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, if... such Member at anytime thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributed to such distribution.

(Emphasis added).

The term "accrued benefit" is essential to understanding the analysis involved in the Section 9.6 methodology. As set forth at Section 1.1 of the 1989 Retirement, the term "accrued benefit" is defined as follows:

> The normal retirement benefit which a Member has earned up to any date and

> which is payable at Normal Retirement Date in an amount computed in accordance with [S]ection 4.3, based, however, only upon Average Monthly Compensation received and Years of Participation rendered by a Member up to the date as of which the accrued benefit is computed.

(Emphasis added).

The provisions of Section 9.6 contemplate that the RIGP Plan will either include in its database or have access to payroll records at Xerox Corporation to determine the five highest years of compensation during the first period of employment of a rehired plan participant which is required to calculate the accrued benefit offset attributed to his first period of employment. However, it is our understanding that you have been informed by counsel for the Xerox Plan Administrators that the database maintained for the RIGP Plan does not include compensation for periods before 1985. It is our further understanding that you have requested counsel for the Xerox Plan Administrators obtain this data from other sources such as the payroll department of Xerox Corporation. You have also ascertained that this information may be obtained from the Social Security Administration if the rehired plan participant had not maintained his tax returns for periods before 1985.

Notwithstanding the difficulty you are having in obtaining this information concerning the compensation paid to a number of your plaintiffs during the first period of their employment, you have been able to provide this office with compensation

data relating to their first period of employment with respect to two of the plaintiff rehired plan participants, namely, Alan H. Clair and Floyd D. Swaim. Based upon this information, we hereby provide you with two examples of the methodology which can be used to calculate the lump sum value of the standard RIGP Plan annuity in accordance with Section 9.6 of the 1989 Restatement.

You must first ascertain the lump sum value of the standard RIGP Plan annuity. Once that calculation is performed, you then must compare that figure with the rehired plan participant's Transitional Retirement ("TRA"), if any, and his Cash Balance Retirement Account ("CBRA") to determine which of these three alternative retirement benefits described in Section 4.3 of the 1989 Restatement provides the highest retirement benefit.

In accordance with the information provided to you by the Xerox Plan Administrators, the first period for Mr. Clair begins with his original date of hire on October 1, 1970 and ends on April 16, 1985 for a total of approximately 14.583 years. Mr. Clair was rehired on July 1, 1987 and remained employed through March 1, 2006 which results in another 18.667 years of employment at Xerox as of that date. For the purpose of this Section 9.6 analysis and methodology, therefore, the phrase "all Years of

Participation" calculates out to a total of 33.250 years.[2]

We then ascertained that the average of his five highest years of compensation was $145,155 as set forth on the Excel spreadsheet provided by the Xerox Plan Administrators. Utilizing the "all Years of Participation" formula as the starting point to calculate the standard RIGP Plan annuity (1.4% times $145,155 times 33.250 years) results in a total annual accrued benefit of $67,569.65. We next determined the accrued benefit attributed to Mr. Clair's first period of employment. Based upon information provided by Mr. Clair, the highest five years of compensation attributed to him during his first period of employment (1978 - $47,343; 1981 - $59,428; 1982 - $44,508; 1983 - $52,660; 1984 - $63,746) averages out to $53,537. Applying the Section 4.3 formula (1.4% times $53,537 times 14.583 years) results in an annual accrued benefit offset of $10,930.47. Deducting this figure from the total accrued benefit attributable to all Years of Participation leaves us with a net annual accrued benefit of $56,639.18, or a net monthly accrued benefit of $4,719.93. We then applied the appropriate conversion factor of 173.2650 (based on the plan participant's age of $62^{7}/_{12}$, the spouse's age of

---

[2] Although the plan generally limits Years of Participation to 30 for purposes of the benefit under Section 4.3(a), Section 9.6 refers to "all Years of Participation." Given the ambiguity in the Plan, we have used the more liberal interpretation.

60 5/12, the GATT[3] rate of 4.46%, and the applicable GATT mortality table) in order to determine the lump sum value of Mr. Clair's net accrued benefit. This calculation results in a net lump sum benefit of $817,799 ($4,719.93 x 173.2650).

In accordance with the information provided to you by the Xerox Plan Administrators, the first period of employment for Mr. Swaim begins with his original date of hire on February 1, 1967 and ends on October 2, 1983 for a total of approximately 16.667 years. Mr. Swaim was rehired on January 2, 1990 and has remained employed through March 1, 2006 which results in another 16.167 years of employment at Xerox. For the purpose of this Section 9.6 analysis and methodology, therefore, the phrase "all Years of Participation" calculates out to a total of 32.833 years.

We then ascertained from the Excel spreadsheet provided by the Xerox Plan Administrators that the average of his five highest years of compensation was $200,000. Utilizing the "all Years of Participation"

---

[3] The term "GATT" is a reference to the General Agreement on Tariffs and Trade which establishes a rate used to calculate minimum lump sums for pension benefits. It is our understanding that the Xerox RIGP Plan utilizes the GATT rate for August of the previous year (in this case August 2005) to establish the interest rate that is utilized to determine the lump sum value of the standard RIGP Plan annuity. It is our further understanding that for the year 2006, the GATT rate is 4.46%.

formula as the starting point to calculate the standard RIGP Plan annuity (1.4% times $200,000 times 32.833 years) results in a total accrued benefit of $91,933.33. We next determined the accrued benefit attributed to Mr. Swaim's first period of employment at Xerox. Based upon information provided by Mr. Swaim, the highest five years of compensation attributed to him during his first period of employment (1978 - $53,286; 1980 - $59,057; 1981 - $63,061; 1982 - $75,081; 1983 - $55,936) averages out to $61,284.20. Applying the Section 4.3 formula (1.4% times $61,284.20 times 16.667 years) results in an accrued benefit offset of $14,299.65. Deducting this figure from the total accrued benefit attributable to all years of participation leaves us with a net annual accrued benefit of $77,633.68, or a net monthly accrued benefit of $6,469.47. We then applied the appropriate conversion factor of 168.2630 (based on the plan participant's age of 62 $^{11}/_{12}$, the spouse's age of 65, the GATT rate of 4.46%, and the applicable GATT mortality table) in order to determine the lump sum value of Mr. Swaim's net accrued benefit. This calculation results in a net lump sum accrued benefit of $1,088,572 ($6,469.47 x 168.2630).

The Section 9.6 methodology described above is the most equitable method of calculating the lump sum value of the standard RIGP Plan annuity as the basis for a comparison of the alternative retirement benefits provided to rehired plan participants such as their CBRA and TRA accounts. In this case, a comparison of the lump sum value of the standard RIGP Plan annuity with the TRA and CBRA accounts on the Excel spreadsheet provided by the

Xerox Plan Administrators clearly indicate that the lump sum value of the standard RIGP Plan annuity provides the highest alternative retirement benefit for the forty rehired plan participants for whom the database information requested by you was provided.

The second alternative methodology you have asked us to consider is that set forth in the Layaou 2004 decision by District Judge Larimer. In Layaou 2004, the court held that the Xerox Plan Administrators should calculate the actuarial lump sum value of the standard RIGP Plan annuity and thereafter deduct from that amount the lump sum payment received when the Xerox rehire was previously separated from employment. As you pointed out to us, District Court Judge Larimer held in Layaou 2004 as follows:

> [S]ince it is the SPD, not the Plan itself, that controls here...since the SPD did not mention the "phantom account" offset, I believe that the administrator should recalculate plaintiff's benefit without using any "phantom account" at all. In other words, when comparing plaintiff's three retirement benefit formulas, no "phantom account" should be added to his CBRA or TRA, nor should the "phantom account" be subtracted out from his actual benefit.
>
> That does not mean, of course, that the prior lump-sum distribution cannot be taken into account at all. Even the faulty SPD indicated that the participant's "RIGP benefit may be reduced" if he had received a prior distribution. It would not be unreasonable,

> then, for the administrator to subtract out the amount of the prior distribution; otherwise, plaintiff would receive a windfall, since under the RIGP formula he would be getting credit for all his years of service at Xerox, including years for which he had already received benefits.

330 F.Supp.2d at 304.

In our opinion, the Layaou 2004 methodology is consistent with the description provided in the SPD entitled "You and Xerox: Planning for a Secure Retirement" which states as follows:

> If you are eligible for benefits from other Xerox retirement plans, including *predecessor plans*, your benefit from the Retirement Income Guarantee Plan could be reduced to account for the income you will be receiving from those plans. The amount you receive may also be reduced if you had previously left the company and received a distribution at that time...

That is, the SPD which describes the Xerox Corporation 1989 Restatement of the RIGP Plan states that, in the event you have previously left Xerox Corporation and received a distribution at that time, the amount you receive may be reduced by the amount of the distribution. This statement clearly contemplates that a rehired plan participant would have his retirement benefit calculated based on all Years of Participation. Treating this statement as a promise by the employer to the employee, in the case of Mr. Clair, utilizing the Section 4.3 formula in the

1989 Restatement, the lump sum value of his standard RIGP Plan annuity is $878,713 (as shown on the Excel spreadsheet from Xerox) less $63,612, which was the amount of the distribution he received when previously separated from employment. The result of this calculation is that Mr. Clair's net lump sum value of the standard RIGP Plan annuity is $815,101. This net retirement benefit is less than the amount which results from applying the Section 9.6 methodology.

Similarly, application of the Layaou 2004 formula with respect to Mr. Swaim results in a determination that the lump sum value of his standard RIGP Plan annuity is $1,177,368 from which we deduct the sum of $74,547, the distribution he received when previously separated from employment. This results in a net lump sum value of the standard RIGP Plan annuity for Mr. Swaim of $1,102,821, an amount slightly larger than that which he would have received under the Section 9.6 methodology described above.

Based upon our review of the database information provided by the Xerox Plan Administrators with respect to the forty rehired plan participants identified as either being in retirement status or who intend to retire during the year 2006, it is clear that the lump sum value of the standard RIGP Plan annuity, whether calculated under the Section 9.6 methodology or the Layaou 2004 methodology, results in a higher retirement benefit than either of the alternative TRA and CBRA accounts as described on the Excel spreadsheet provided by counsel for the Xerox Plan Administrators.

You have also asked our office to determine if it would constitute an equitable alternative methodology to treat rehired plan participants the same as a new hire. In our opinion, this methodology does not comport with the equitable principles which the Second Circuit in the Frommert action stated should be the guiding principles for the District Court. It is clear from our review of the 1989 Restatement that Section 9.6 provides the appropriate method to ensure that a rehired plan participant does not receive a duplicate retirement benefit. The Layaou 2004 methodology as an alternative to the Section 9.6 methodology is consistent with the promises made in the SPD describing the RIGP Plan. That is, the rehired plan participant understood that his retirement benefits would be calculated in some manner that would reflect all Years of Participation and not just the years since the date of his rehire. However, for the purpose of setting forth all of the alternatives to be considered by the court, we have computed what the result would be if rehired plan participants such as Messrs. Clair and Swaim were to have their retirement benefits calculated the same as a new hire.

The only reference in the Second Circuit opinion which would possibly support treating rehired plan participants the same as new hires is the citation to Section 1.44f of the 1989 Restatement, which is part of the definition of the Years of Participation and provides: "No credit shall be given for any period with respect to which a lump sum payments has been made under Sections 8.5 and 8.8." Assuming that this provision provides some justification for

excluding in the calculation of the retirement benefits the years for which they received a lump sum payment, the calculation for Messrs. Clair and Swaim would be as described below.

For Mr. Clair, we calculated the lump sum value of the standard RIGP Annuity based strictly on the years of employment since he was rehired (1.4% times $145,155 times 18.667). This results in an annual accrued benefit equal to $37,933.84, or a monthly accrued benefit of $3,161.15. Applying the appropriate conversion factor of 173.2650 results in a lump sum value of $547,717 as compared to $817,799 under the Section 9.6 methodology and $815,101 under the Layaou 2004 methodology.

With respect to Mr. Swaim, we also calculated the lump sum value of the standard RIGP annuity based strictly on the years of employment since he was rehired (1.4 times $200,000 times 16.167). This results in an annual accrued benefit equal to $45,266.67, or a monthly accrued benefit of $3,772.22. Applying the appropriate conversion factor of 168.2630 results in a lump sum value of $634,725 as compared to the $1,088,572 under the Section 9.6 methodology, and $1,102,821 under the Layaou 2004 methodology.

You have also asked us to comment on the column provided as part of the Excel spreadsheet headed "10/1/1998 age 65 Formula Benefit" which provided you with information you did not request from the Xerox plan administrators. As best we can ascertain, it appears to set forth for each of the 40 individuals identified on the spreadsheet a calculation of the

annual benefit accrued from their rehire date to October 1, 1998. We do not understand the purpose of this column, except that we anticipate it will be utilized in the memorandum to be submitted by counsel for the Xerox Plan Administrators for review by District Judge Larimer in connection with the hearing he has scheduled on July 11 and 12 to determine the appropriate methodology to be used to calculate the benefits due to the named plaintiffs.

Finally, you have asked us to comment on the position taken in settlement negotiations by counsel for the Xerox Plan Administrators that there should be an interest factor attributed to the lump sum payment received by the hired plan participant when previously separated from employment. In the event that the Xerox RIGP Plan had allowed rehired plan participants to buy back into the plan, an interest factor would be entirely appropriate. In that instance, the plan participant would be given a choice as to whether he wanted to keep his money and thereby be subjected to a reduction in future retirement benefits based on an interest factor, or return the distribution previously received so that the money can then be used by the RIGP Plan to fund his future retirement benefits. In the absence of a buy-back provision in the 1989 Restatement, we do not believe that it would be in accordance with equitable principles to impute interest on the lump sum payment received by rehired plan participants such as the named plaintiffs in the Frommert action. We also note that based on the thousands of Plans that have been administered by Abar Pension Services, Inc., it is extremely rare for a Plan not to

permit participants to repay a distribution and restore their previously accrued benefit.

We trust that this letter provides you with an explanation of the mechanics of the Section 9.6 methodology as well as implementation of the Layaou 2004 methodology both of which are supported by provisions of the 1989 Restatement and the SPD describing the 1989 Restatement. We have also provided you with the mechanics of the alternative methodology mentioned by District Judge Larimer at the May 30, 2006 hearing in determining the calculation if rehired plan participants were treated the same as new hires. As stated above, we believe that, based on the provisions of the 1989 Restatement of the Xerox RIGP Plan and the SPD describing it, the most equitable and actuarially sound method which avoids payment of duplicate benefits is the Section 9.6 methodology.

Sincerely yours,

ABAR PENSION SERVICES, INC.

Philip D. Cofield, E.A.

* * * * *

2005

PHILIP D. COFIELD, E.A.

A. EDUCATION

INSTITUTION	YEAR OF GRADUATION	MAJOR COURSE OF STUDY/ COMMENDATIONS
1. Middletown North High School	1989	College Preparatory Salutatorian
2. California Institute of Technology	1993	B.S. in Mathematics and Economics

B. PROFESSIONAL AFFILIATIONS

1. Member of the American Society of Pension Professionals and Actuaries (2002)

2. Enrolled Actuary before the Joint Board of the Department of Labor and the Department of Treasury (1997).

C. WORK EXPERIENCE

12 years as an independent pension consulting actuary, designing, implementing and administering thousands of corporate retirement plans for Abar Pension Services, Inc.

* * * * *

2005

MIKEL R. UCHITEL, F.S.A.

A. EDUCATION

INSTITUTION	YEAR OF GRADUATION	MAJOR COURSE OF STUDY/ COMMENDATIONS
1. Irvington High School	1963	College Preparatory Valedictorian
2. Wharton School of Finance and Commerce University of Pennsylvania	1967	B.S. in Mathematics and Economics

B. PROFESSIONAL AFFILIATIONS

1. Fellow of the Society of Actuaries (1975)
2. Member of the American Academy of Actuaries (1974)
3. Member of the American Society of Pension Professionals and Actuaries (1987)
4. Enrolled Actuary before the Joint Board of the Department of Labor and the Department of Treasury (1976)

C. WORK EXPERIENCE

1. 2 years as home office life insurance company actuary; TIAA-CREF and Independent Life and Accident Insurance Company.

2. 35 years as an independent pension consulting actuary, designing, implementing and administering thousands of corporate retirement plans; Actuarial Services, Inc. and Abar Pension Services, Inc.

Abar Pension Services, Inc.
PENSION, PROFIT SHARING, 401(K) PLAN
DESIGN AND ADMINISTRATION

MIKEL R. UCHITEL, FSA, EA, MSPA
MARK SHEMTOB, ASA, EA, MSPA
PHILIP D. COFIELD, EA, MSPA
SCOTT M. FEIT, CPA, QKA

25B VREELAND ROAD – SUITE 209
FLORHAM PARK, NJ 07932-1900
(973) 660-2100
FAX: (973) 660-2111
abar@abarpension.com

June 30, 2006

Robert H. Jaffe, Esq.
Robert H. Jaffe & Associates, P.A.
8 Mountain Avenue
Springfield, New Jersey 07081

Re: *Paul J. Frommert, et al. v. Sally L. Conkright, et al.*
Civil Action No.: 00-cv-6311

Dear Mr. Jaffe:

You have asked Abar Pension Services, Inc., to prepare a supplemental letter opinion in response to the affidavit of Lawrence M. Becker, plan administrator of the Xerox Retirement Income Guarantee Plan (the "RIGP") and the expert report of Lawrence Sher, a consulting actuary engaged by Nixon Peabody LLP, regarding the above referenced action (the "Frommert" action).

While Mr. Becker acknowledges that "the Second Circuit concluded that the offset referred to in the 1989 restatement could not be read to encompass the use of a 'phantom account'," the method that he proposes to offset for prior distributions is effectively using a phantom account, and just applying a different interest rate assumption than Xerox has been using. The problem with this method remains that Xerox effectively reduced future benefits under the plan when they began offsetting for the CBRA or TRA instead of the regular RIGP formula benefit, in cases where the value of the CBRA or TRA exceeded the value of the RIGP formula benefit. This alternate method of calculating retirement benefits of rehired plan participants is not disclosed in the SPD describing the 1989 restatement, which is the pre-amendment plan that is the subject of the litigation, and should therefore not be allowed.

In addition, as you have called to our attention, the US Court of Appeals for the Ninth Circuit has recently ruled in Miller, et al. v. Xerox Corporation, et al. (the "Miller" decision), that the Xerox RIGP "reduces pension benefits by more than the accrued pension benefit attributable to the earlier distributions," and is therefore in violation of ERISA. Taking into account that the Miller decision analyzes the RIGP, which is the same plan at issue here, and further taking into account the regulation cited in Miller which addresses plans that do not provide "buyback" arrangements for previously distributed benefits, we conclude that it is inequitable to offset the entire distribution received by rehired participants, as opposed to the benefit attributable to the RIGP formula.

To illustrate the inequity of Mr. Becker's proposal, rehired participants would receive lower benefits than they would if they were just treated as new hires upon their rehire date. They are effectively being treated as if they owed the plan benefits upon rehire, and they were not informed of that situation upon rehire, nor at the time of the 1989 RIGP restatement.

The following chart compares the benefits that would be payable to three employees: Alan Clair, Floyd Swaim, and Paul Frommert, under the method proposed by Mr. Becker, and if we treat them as if they were newly hired on their dates of rehire:

Employee Name	Alan Clair	Floyd Swaim	Paul Frommert
a) Original Date of Hire	10/1/1970	2/1/1967	12/21/1960
b) First Date of Termination	4/16/1985	10/2/1983	1/16/1986
c) First Period of Service	14.5833 yrs.	16.6667 yrs.	25.0833 yrs.
d) Date of Rehire	7/1/1987	1/2/1990	11/16/1989
e) Calculation Date	3/1/2006	3/1/2006	3/1/2006 (term. 3/24/2002)
f) Second Period of Service	18.6667 yrs.	16.1667 yrs.	12.4167 yrs.
g) Total Service	33.2500 yrs.	32.8333 yrs.	37.5000 yrs.
h) Monthly Final Average Pay	$12,096.28	$16,666.67	$6,849.24
i) Monthly benefit for rehire period if treated as new employee [.014*(f)*(h)] [4]	$3,161.16	$3,772.22	$1,190.63

[4] All periods of service (items c, f, and g) are limited to 30 years

Employee Name	Alan Clair	Floyd Swaim	Paul Frommert
j) Lump sum value of (i) as of 3/1/2006[5]	$547,718.39	$634,725.05	$187,242.88
k) Monthly benefit based on all service [.014*(g)*(h)][1]	$5,080.44	$7,000.00	$2,876.68
l) Prior distribution amount	$63,612.26	$74,546.60	$145,780.33
m) Date of prior distribution	4/16/1985	10/23/1983	1/25/1986
n) Age at date of prior distribution	41.7500	40.5000	46.8333
o) Interest rate applied to prior distribution	8.50%	8.50%	8.50%
p) Age 65 annuity factor[6]	106.6622	106.6622	106.6622
q) Adjustment for payment age[7]	6.664099	7.379528	4.401901
r) Annuity offset of prior distribution [(l)/(p)*(q)]	$3,974.40	$5,157.58	$6,016.29
s) Xerox proposed monthly benefit payable to participant [(k)-(r)]	$1,106.04	$1,842.42	$0.00

---

[5] Lump sum conversion factors as of 3/1/2006 are based on the GAR94 mortality table, the 2006 GATT interest rate of 4.46%, and a benefit payable as a 50% joint and contingent annuity. Lump sum factors are 173.254952 for Mr. Clair, 188.282976 for Mr. Swaim, and 157.263650 for Mr. Frommert.

[6] Based on GAM83 blended (50% male, 50% female) mortality table

[7] Assumes no pre-retirement mortality

Employee Name	Alan Clair	Floyd Swaim	Paul Frommert
t) Lump sum value of (s) as of 3/1/2006[2]	$191,638.02	$310,011.12	$0.00

To summarize the above, Mr. Clair's lump sum benefit under the method proposed by Mr. Becker would be $191,638 versus $547,717 if he is treated as a new hire; Mr. Swaim would receive a lump sum benefit of $310,011 under the method proposed by Mr. Becker versus $634,725 if he is treated as a new hire; and Mr. Frommert would receive nothing under the method proposed by Mr. Becker versus $187,243 if he is treated as a new hire. In each case, the participant's benefit using Mr. Becker's method is less than half of what would be calculated if the participant is treated as a new hire, with the difference for Mr. Frommert being particularly dramatic.

It should also be noted that Mr. Frommert is now past normal retirement age, and his benefit must be actuarially increased to account for the delayed payment. Given the hypothetical nature of the above calculations, we did want to add more complexity by including the calculation of the actuarial increase here. It will need to be included in the calculation of his benefit when a payment methodology has been determined.

Of course, the above method of treating rehired employees as new hires is not provided for in the RIGP. Our purpose for showing the above comparison is primarily to emphasize the inequity of using Mr. Becker's method of offsetting for prior distributions.

In light of the Miller decision, we reiterate the position of our June 22 letter, which is that the most equitable method of calculating benefits for rehired employees such as your clients is to use the methodology described in Section 9.6 of the 1989 RIGP restatement. As calculated in our June 22 letter, using that methodology, Mr. Clair's accrued benefit would be $4,719.93 per month (equivalent to a lump sum value of $817,799), and Mr. Swaim's accrued benefit would be $6,469.47 per month (equivalent to a lump sum value of $1,088,572). This method allows for an offset of the accrued benefit provided for by the RIGP, rather than the Profit Sharing Plan distributions actually received by the participants, which was deemed to be improper in the Miller decision.

In a footnote, the Miller decision also mentions that the basis of the Frommert decision is the failure to disclose to rehired plan participants that the accrued benefit earned upon being rehired would be reduced by more that the RIGP formula benefit attributable to the distribution. This failure by the plan administrators to give appropriate notice of the reduction in future accruals violates certain provisions of ERISA cited in the Frommert decision. Because of this failure to notify participants, the participants should receive benefits based on the plan provisions prior to amendment, which would provide a benefit under the Section 9.6 methodology as described in our June 22, 2006 letter, where the offset used in the calculation would be the benefit under the RIGP benefit formula, and not the Profit Sharing Plan balance received.

Sincerely yours,

ABAR PENSION SERVICES, INC.

Philip D. Cofield, E.A.

REVISED SUPPLEMENTAL REPORT

OF

LAWRENCE SHER

Prepared for Nixon Peabody LLP

in

Paul J. Frommert et al. v.

Conkright, Xerox Corporation Pension Plan Administrator, et al.

00-CV-6311-(L)

United States District Court

For the Western District of New York

* * * * *

Defendants' counsel asked me to comment on the June 23, 2006 letter memorandum from Robert H. Jaffe to Judge Larimer ("Jaffe letter"), including the Abar Pension Services letter attached thereto ("Abar letter"). This report supplements my previous report of June 26, 2006 that was included as Exhibit A in a June 26, 2006 Affidavit of Margaret Clemens.

Specifically, defendants' counsel asked me to comment on the approaches advocated, respectively, by Robert Jaffe ("Jaffe approach") and by Abar Pension Services ("Abar approach"), to reflect previous distributions from The Xerox Corporation Profit Sharing Retirement and Savings Plan ("profit sharing plan") in determining the benefit payable

under Xerox's Retirement Income Guarantee Plan ("RIGP")[8]. As discussed below, in my opinion, buth the Jaffe and Abar approaches would provide windfalls to the plaintiffs and would seem to be inconsistent with the decision and remand instructions of the Second Circuit Court of Appeals.

The Jaffe Approach

It is my understanding that the Jaffe approach involves the following steps: (1) determine the floor annuity benefit under the RIGP by aggregating the service and compensation for the two periods of a plaintiff's employment, (2) find the lump sum present value of that annuity at the plaintiff's retirement age, and (3) offset that sump sum by the dollar amount of the previous distribution.

The Jaffe approach would certainly be easier than other approaches to administer. However it violates a fundamental actuarial principle, thereby creating significant economic windfalls. The principle is that a dollar received today is worth more than the same dollar received a year from now and even more than a dollar received two years from now, etc. The Jaffe approach disregards this fundamental "time value of money" principle by treating a lump sum received many years earlier as having the same value today.

---

[8] In 1990, the accounts under the profit sharing plan were merged into, and are now maintained as separate transitional retirement accounts under, the RIGP. References to the profit sharing plan and profit sharing accounts in this report include these transitional retirement accounts.

The result is that the offset for prior distributions is understated, in many cases significantly, in real economic terms.

Since the underlying purpose of a pension plan is to provide retirement income, one way to illustrate how the time value of money is reflected in the marketplace is to observe how insurers price annuities. It is indisputable and common knowledge that at any given point in time, for a given sum of money (i.e., a single premium) an insurer will offer a much higher annuity beginning at age 65 to someone who is currently age 40 as compared to someone currently age 65. That pattern arises because of fundamental economic factors, notably the time value of money. In order for the annuity product to be viable, the person now age 40 must be compensated for the loss of purchasing power that will occur in the intervening 25 years.[9]

The potential windfall to participants caused by disregarding the time value of money can be seen by considering the case of one of the plaintiffs, Alan Clair. Mr. Clair was born in 1943 and was originally hired by Xerox in 1970. He left Xerox in 1985 and received a distribution of $63,612, entirely form the profit sharing plan (because that had greater value than the highest average pay formula). According to the Abar letter, Mr. Clair had an "accrued" age 65

---

[9] In order to provide the higher annuity to the 40 year old, the insurer would invest the premium in low-risk assets that will compensate the insurer for the time value of money.

annuity benefit of $10,900 per year on his first date of termination in 1985.[10] Mr. Clair was rehired by Xerox in 1987 and remains employed today. He is now approaching age 63.

I examine two scenarios that are variations on Mr. Clair's situation to illustrate the potential windfalls under the Jaffe approach.

Scenario 1: Assume that instead of being rehired in 1987, Mr. Clair was rehired one month before his 65th birthday in 2008, but he quickly decided to retire on his 65th birthday.[11]

- Hypothetical Clair's benefit under the highest average pay formula is virtually unchanged from what Mr. Clair had earned as of his 1985 termination date. The one month of additional

---

[10] The Abar letter determines Mr. Clair's accrued benefit on their original date of termination in 1985 using the highest average pay formula in effect in the 1989 restated plan. My understanding is that a different benefit formula applied prior to 1989. However, for purposes of this discussion, I have used the Abar letter calculations. As discussed below, I believe there are more serious issues with the determination of the "accrued benefit" under the Abar approach.

[11] Although in reality this scenario might seem unrealistic, if a plan has a provision that allows employees to get easy windfalls, it can be assumed that employees will quickly learn of these opportunities and the plan will become the victim of this "moral hazard."

service just before age 65 increased the annual annuity at age 65 from $10,900 to $11,000, or to about $900 per month.

- Using the same actuarial basis as in the Abar letter, the $900 monthly annuity has a lump sum value at age 65 of $147,800 ($900 multiplied by factor of 164.2574).[12]
- Under the Jaffe approach the hypothetical Mr. Clair would be entitled to a lump sum at age 65 of about $84,200 ($147,800 less his original lump sum of $63,612).
- On the other hand, if a new employee worked a single month just before age 65 and earned a monthly annuity of $15.00, that person would be entitled to a lump sum of about $2,500.[13]

Thus, for working one month, Mr. Clair would receive $84,200, considerably more than what he received for his first 14.583 years of service and over 33 times what a new employee would earn for the same one month of service. The additional benefit

---

[12] Consistent with the Abar letter, the 164.2574 factor is determined based on Mr. Clair's assumed age 65 retirement, his spouse's then current age of 62 10/12, the GATT interest rate of 4.46% (the 2006 rate, assumed to remain unchanged) and the applicable GATT mortality table).

[13] I used the same lump sum factor as used above in the Jaffe approach, 164.2574, multiplied by $15.00. The $15.00 benefit was determined using an assumed 2006 pay of $155,000, which is somewhat higher than Mr. Clair's highest five year average pay of $145,155 in 2006.

that the hypothetical Mr. Clair would be given is clearly not attributable to the rendering of one month of service. Rather it is due to the failure to reflect the time value of money on the prior distribution.

Scenario 2: Assume that Mr. Clair did not have the two-year break in Xerox employment between 1985 and 1987 and that his compensation is the same as the real Mr. Clair in all years before 1985 and after 1987.

- As of March 1, 2006, the hypothetical Clair's benefit under the highest average pay formula would be $60,965 (1.4% times $145,155 times the 30 years -- the plan maximum service), or $5,080.43 per month.[14]
- The lump sum present value of the $5,080.43 monthly annuity as of March 1, 2006 is $880,260 ($5,080.43 times 173.2650).
- The $880,260 floor benefit clearly exceeds the sum of the value of his prior distribution of $63,612 plus his actual TRA of $48,783, plus the additional profit sharing contributions he would have received during the 1985-1987 period.
- Thus, the hypothetical Mr. Clair would have been entitled to a total from the floor-offset arrangement of $880,260.
- Under the Jaffe approach, the real Mr. Clair (who worked 2 years less than his continuously

---

[14] This is the same benefit that the real Mr. Clair has earned as of March 1, 2006 because in both cases the 30 year service limit applies.

employed counterpart) would receive a lump sum on March 1, 2006 of $816,648, plus the $63,612 lump sum from 1985 (even without adding any interest), resulting in a total from the floor-offset arrangement of $880,260.

Clearly, the real Mr. Clair is much better off under the Jaffe approach. They receive the same total lump sum, $880,260, but the real Mr. Clair received a portion of it 21 years earlier.[15] Since the floor benefit is the same for the real and hypothetical Clairs (due to the 30 year service cap), the difference between them is that the real Clair received a prior distribution and the hypothetical one did not. Thus, the greater value bestowed upon the real Mr. Clair is directly attributable to the fact that the Jaffe approach disregards the time value of money in reflecting the prior distribution.

The two examples demonstrate that by disregarding the time value of money the Jaffe approach would set up a privileged class of employees who, as a result of reemployment, would receive greater benefits than otherwise similar employees who did not receive distributions. In addition, based on data provided to me by defendants' counsel (copy attached), the Jaffe approach would treat rehires better than under a new employee approach for 83 of the 84 plaintiffs

---

[15] If we were to add interest, the $63,612 received in 1985 would likely more than double in value by 2006.

(and in the one other case, the two approaches produce the same result).[16]

Abar Approach

It is my understanding that the Abar approach involves the following steps: (1) determine the floor annuity benefit under the RIGP by aggregating service and compensation for the two periods of a plaintiff's employment[17], (2) subtract the annuity benefit determined under the highest average pay formula on the first termination of employment date. The resulting annuity could then be converted to a lump sum using the statutory lump sum basis in the RIGP.

The fundamental problem with the Abar approach is that the "offset" does not reflect the prior distributions actually received. Rather it substitutes the employee's benefit under the highest average pay formula on the original date of termination.[18] The

---

[16] I understand that the data provided was developed by the RIGP's actuary, Jeff Clymer. In making these comparisons, I used the columns "New Hire 30 year total No 98 Cutoff" and "Jaffe Layaou."

[17] This is the same as step one in the Jaffe approach except that the Abar approach disregards the plan's 30 year limit on credited service.

[18] As discussed in an earlier footnote, in the case of Mr. Clair, the benefit under the highest average pay formula was determined by Abar using the 1989 highest average pay formula rather than the formula actually in effect on Mr. Clair's 1985 termination date.

Abar letter refers to Section 9.6 of the RIGP (Nonduplication of Benefits) as justification for its approach. Based on my experience with similar language in numerous plans, I disagree with the Abar interpretation of Section 9.6. The pertinent language is as follows:

> In the event any of or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date,..., the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

The Abar approach apparently interpreted "accrued benefit" to mean the benefit under the highest average pay formula. However, the plan's definition of accrued benefit refers to the amount determined in Section 4.3 (for post-1989 retirees) which, in turn, provides that the benefit is the largest of the highest average pay formula, the "monthly benefit which could be purchased by a Member's Transitional Retirement Account, as calculated using annuity rates established by the PBGC" (Section 4.3e.), and a similar calculation involving the Member's cash balance account (section 4.3f.).[19][20]

---

[19] The term "accrued benefit" is not capitalized in Section 9.6. I do not know whether that was an oversight, but resolution of the matter would have no effect on my problem with the Abar approach.

[20] I disagree with the position taken in the Abar approach that the language in Section 9.6 "based on all Years of Participation" causes the otherwise (continued...)

The consequence of the Abar approach disregarding any value of the profit sharing account in excess of the benefit under the highest average pay formula is significant. For example, the present value of the age 65 annual annuity of $10,930.47 shown in the Abar letter as Mr. Clair's benefit under the highest average pay formula on his termination in 1985 is $13,342.21 That compares to the actual distribution of $63,612 from a profit sharing plan. Thus, in Mr. Clair's case, the Abar approach reflects an offset that is only one-fifth of the value of the prior distribution ($13,342 divided by $63,612).

The Abar approach seems to me to be in violation of the Second Circuit's decision and instructions to the Court to equitably reflect the prior distribution. It also seems to be in conflict with IRS Revenue Ruling 76-259, which indicates that the offset in a floor-offset arrangement must reflect the benefit deemed provided by the employee's profit sharing account, including "the amount deemed provided on the determination date by the vested portion of the account balance in the profit-sharing plan (plus the additional amount that would have been provided by any prior distribution from the account balance)."

---

applicable 30 year limit on credited service to be overridden. I doubt that such an outcome was intended and is another source of windfall under the Abar approach.

[21] The present value was determined using the plan administrator's recommended approach, i.e., using the statutory lump sum interest rate in effect in 1985, subject to an 8.5% cap.

Assuming that my understanding of the Abar approach is correct, I believe that it systematically understates offsets for plaintiffs whose distributions exceeded the annuity under the highest average pay formula.

New Employee Approach

Both the Jaffe and Abar letters mention, but do not advocate, a "new employee" approach. The new employee approach simply disregards the prior offset as well as the prior service in determining the floor benefit. It is not clear to me whether the new employee approach complies with the Second Circuit requirement that an offset take into account the prior distribution. While the new employee approach does not have the same types of issues that the Jaffe and Abar approaches have, the new employee approach tends to skew benefits in favor of rehired employees as compared to employees who do not have a break in employment. However, in some instances, the new employee approach can be less favorable to rehired employees as compared to an approach that credits past service and takes into account prior distributions in a reasonable manner such as the plan administrator's approach.

Buy Back Provisions

The Abar letter, in commenting on the Jaffe approach, correctly notes that when a plan has repayment provisions it is perfectly acceptable to require that interest be paid on the distribution to reflect the time that has passed in the interim -- i.e., the time value of money. Yet, the Abar letter objects to reflecting the passage of time on a distribution that has not been repaid if the plan does not permit

repayments, as in the Xerox situation. In support of making that distinction, the Abar letter indicates that for the "thousands of Plans that have been administered by Abar Pension Services, Inc. it is extremely rare for a Plan not to permit participants to repay a distribution and restore their previously accrued benefit." My experience, which is primarily with plans sponsored by large employers like Xerox, is different.

Large employers typically do not require rehired employees to pay back distributions to get credit for prior service under a defined benefit plan. It is also my experience that defined benefit and defined contribution plans typically do not allow rehired employees who were previously fully vested to repay their prior distributions.

In my opinion, there is no justification to ignore the time value of money in an actuarial analysis. Moreover, because the RIGP automatically restores prior service for rehires (i.e., without requiring rehires to repay prior distributions), the point that the Abar letter makes seems to be moot.

Conclusions

There are two approaches that I believe are actuarially sound for taking into account previous distributions to rehired employees in a floor-offset arrangement. One approach is to put the employee (and the floor-offset arrangement) into the same financial status as would have arisen had the prior distribution remained in the plan - the so-called "phantom account" approach. The other is to express the prior distribution as an actuarially equivalent

normal retirement annuity using reasonable actuarial assumptions on the distribution date.

The Second Circuit rejected the first approach with respect to pre-1998 years in this case. The plan administrator has adopted the second approach and has proposed to implement it using actuarial assumptions that I consider to be reasonable. In my opinion, neither the Jaffe nor Abar approach is reasonable. Both would create windfalls for rehired employees and do not seem to comply with the instructions of the Second Circuit to reflect the prior distributions in an equitable manner. Also, neither of those approaches seems to satisfy the long-standing IRS requirement in Revenue Ruling 76-259 that the offset in a floor-offset arrangement include the amount of the benefit that would have been provided by a prior distribution from the employee's profit sharing account.

/s/ Lawrence J. Sher, F.S.A.
Lawrence J. Sher, F.S.A.
July 7, 2006

Robert H. Jaffe, Esq. (RJ9773)
ROBERT H. JAFFE & ASSOCIATES, P.A.
8 Mountain Avenues
Springfield, New Jersey 07081
(973) 467-2246
Attorneys for Plaintiffs
Paul J. Frommert, et al.

PAUL J. FROMMERT, et al. Plaintiffs, v. SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ AND LAWRENCE M. BECKER, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN ADMINISTRATORS and XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, Defendants.	UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK CIVIL ACTION NO. 00-CV-6311 AFFIDAVIT OF PLAINTIFF ALAN H. CLAIR IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

STATE OF NEW JERSEY :
: ss.
COUNTY OF UNION :

ALAN H. CLAIR, of full age, being duly sworn, upon his oath, deposes and says:

1. I am one of the named plaintiffs in the above captioned action. I make this affidavit in support of a motion for summary judgment brought by your affiant and by lead plaintiff Paul J. Frommert to enforce the terms of the 1989 Xerox Retirement Income Guarantee Plan Document, exclusive of amendments to the aforesaid 1989 master plan document, amendments which were effected by the defendant Plan Administrators without notice being given to your affiant in my capacity as a plan participant prior to their effective date as required by law.

* * * * *

40.I believe it appropriate to call attention of the court to the fact that, a strict application of the terms contained in the 1989 Restated RIGP Plan Document and particularly Sections 1.44 and 9.6 would place me in a similar position as that of a new hire employed on the same date as my Reemployment Commencement Date. The only exception is that, for the purpose of calculating the benefits payable to me and my wife if I took early retirement, I would have had the advantage of my full length of service as an employee of Xerox Corporation to offset the requisite 1/240th per month reduction for plan participants who take early retirement.

* * * * *

/s/ _____

Alan H. Clair

Sworn and subscribed before
me this 26th day of February
2003

/s/ _____

[Notary Public]

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

PAUL J. FROMMERT, et al., Plaintiffs	)	0 0-CV-6311 (L)
vs.	)	
	)	Rochester, New York
SALLY L. CONKRIGHT, et al., Defendants.	)	July 11, 2006 9:30 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

ROBERT H. JAFFE &
ASSOCIATES, P.A.
BY: ROBERT H. JAFFE, ESQ.
8 Mountain Avenue
Springfield, New Jersey
07081

- and -

SCHELL & SCHELL, P.C.
BY: GEORGE A. SCHELL, ESQ.
410 Perinton Hills Office Park
Fairport, New York 14450
Appearing on behalf of the Plaintiffs

NIXON PEABODY, LLC
BY: MARGARET A. CLEMENS, ESQ.
Clinton Square, P.O. Box 31051
Rochester, New York 14603
Appearing on behalf of the Defendants

COURT REPORTER: RMR, CRR, CRI — Christi A. Macri, FAPR,

Kenneth B. Keating Federal Building
100 State Street
Rochester, New York 14614-0222

* * * * *

PLAINTIFFS' WITNESS, ALAN H. CLAIR, SWORN

DIRECT EXAMINATION

* * * * *

CROSS-EXAMINATION

BY MS. CLEMENS:

Q. Mr. Clair, you said you were still employed at Xerox; is that correct?

A. That's correct.

Q. And you have a background in -- you're an MBA you said? So you have some background in economics?

A. Yes, I do.

Q. You're familiar with the time value of money concept, are you not?

A. Yes, I am.

Q. And you know that money that you took back in 1985, the dollar value of that, despite what you did with it, the dollar value of that based on economic principles is worth more today than when you took it in 1985, you know that, right?

A. That is true.

Q. And you did submit an affidavit to this Court in connection with the summary judgment motion, isn't that right?

A. Yes, I did.

Q. And didn't you review the plan, the whole 1998 plan and other plan provisions at the time?

A. Yes.

Q. And you represented to the Court in the affidavit that based on your review of the 1989 plan, both the 9.6 provision and Section 1.44f, that you thought and you concluded that you were entitled to be treated as a new hire?

A. Ms. Clemens --

Q. No --

THE COURT: Can you answer the question?

BY MS. CLEMENS:

Q. Do you not understand my question? You represented that in your affidavit, did you not?

A. That is part of what I represented.

Q. Well, look at paragraph 40. Do you have the affidavit in front of you?

MS. CLEMENS: Should we mark that as an exhibit, Your Honor?

THE COURT: We can make it -- why don't we make it Plaintiffs' Exhibit 1, if that's all right, unless you --

BY MS. CLEMENS;

Q. Just so the record is clear, I'm handing you Plaintiffs' Exhibit Number 1 and directing you to paragraph 40.

A. Okay, I have it in front of me.

Q. Don't you say in that paragraph, "I believe it appropriate to call attention of the Court to the fact that a strict application of the terms contained in the 1989 restatement RIGP plan document, and particularly Section 1.44 and 9.6, would place me in a similar position as that of a new hire employed on the same date as my reemployment commencement date"?

A. Yes, I do.

Q. And what you -- I believe what you were telling the Court as of the time you did your calculations back then, you did not have available to you the mortality table or the GATT rates; is that right?

A. Yes, nor the benefit.

Q. Did you calculate at all what a new hire would have been given or how a new hire -- benefits as a new hire would be?

A. That was an obvious calculation. What I made -- and I made the statement several times in letters to Xerox was that if someone started to work for Xerox on a particular day, and I returned to work at Xerox on a particular day, we made the same salaries, we worked for the same number of years, we came to retirement time, that I didn't see how I could possibly receive less than that new employee under equity.

Q. That's exactly your position to the plan administrator during your administrative claims process, was it not?

A. It was.

Q. You should not be treated worse than a new hire?

A. It was.

Q. And that's what you represented to the Court on the summary judgment motion?

A. In my affidavit?

Q. Yes.

A. Yes.

Q. Just as an aside, Mr. Clair, in fact, you did receive a price lump sum distribution in 1985; isn't that correct?

A. Yes, I did. I also received something else. I received two letters from the plan administrators.

Q. I was asking you about the lump sum distribution. You did receive a prior lump sum distribution, did you not?

A. I received the distribution.

Q. And, in fact, you have invested that money?

A. That is not pertinent here, respectfully.

Q. But you have invested that money?

A. No, I haven't.

Q. Okay. But now as you're coming into court, is it that your testimony that you expect to be treated better than a new hire?

A. I expect to be treated better than a new hire, that's my testimony.

Q. Better than anybody else in the plan?

THE COURT: Ms. Clemens --

THE WITNESS: Let me finish my sentence.

THE COURT: Mr. Clair, Mr. Clair, Ms. Clemens. We talk one at a time.

MS. CLEMENS: Sorry, Your Honor.

THE WITNESS: May I answer you?

THE COURT: Repeat the question.

BY MS. CLEMENS:

Q. So you really are coming into court today and asking the Court to treat you better than a new hire; isn't that correct?

A. That is correct, for one particular reason. When I returned to Xerox --

Q. I didn't ask you the reason. I was just asking you whether you were asking --

THE COURT: He's entitled to give you a reason.

THE WITNESS: Okay, the reason is when I came back, I was promised that I would be credited with all of my prior service. That is recognition. It was in my mind that, all right, here Xerox has the opportunity to hire back a 15 year veteran with a high skill set.

In return for that, Xerox could have done one of two things: They could have allowed me to buy back into the plan or they could have given me my prior credit. Xerox agreed that was the promise, to give me prior credit.

PLAINTIFFS' WITNESS, PHILIP COFIELD, SWORN

DIRECT EXAMINATION

* * * * *

THE COURT: I think -- well, so you're focusing more on the plan than on the SPD?

THE WITNESS: Yes.

THE COURT: Is there a reason why?

THE WITNESS: Because the SPD is not intended to be mathematically descriptive of everything. It is supposed to be understood by an average participant.

The SPD simply says that you shall offset it, which a person certainly could interpret as meaning you will subtract the dollars you received without interest without any adjustment.

But as an actuary there is some intrinsic time value of money, so I don't think that that is an equitable solution.

* * * * *

CROSS-EXAMINATION

BY MS. CLEMENS:

Q. Mr. Cofield, you said you were an enrolled actuary; is that correct?

A. That's correct.

Q. And actuaries are subject to meeting certain standards in the profession as an enrolled actuary; is that correct?

A. That's correct.

Q. And you're required to comply with basic actuarial standards set by the different actuarial standards boards; isn't that correct?

A. Yes.

Q. And you're familiar with the concept of actuarial equivalents, are you not?

A. Yes, I am.

Q. And you've done that, I think, pretty routinely during the course of your practice as an actuary with Abar Pension Consultants; isn't that correct?

A. Yes.

Q. And part of the underlying fundamental principles underlying that actuarial equivalence includes the concept -- and I believe your words were -- there's some intrinsic value to the time value of money; is that correct?

A. Yes.

* * * * *

Q. Now, in the course of your practice when you determine formula benefits and you have to convert one formula benefit into another, wouldn't you use actuarial equivalence then?

A. Yes.

Q. And you would take into account the time value of money, would you not?

A. Yes.

Q. And when you're looking at things like optional forms of payment, wouldn't you use actuarial equivalence at that point in time?

A. Yes, usually.

Q. And in taking into account the time value of money?

A. Yes.

Q. And if the plaintiffs, such as Mr. Clair who testified this morning, in fact, got money in 1985, there is some time value of that money that he got that's worth more today than it was worth in 1985; is that correct?

A. Yes.

Q. Now, one of the things that you said is that the SPD -- in your reading in this case of the 1989 SPD was that it led to -- I think your words were the Jaffe approach; is that right?

A. Those weren't my words.

Q. The Layaou approach?

A. Yes.

Q. That you would offset for at least the amount of the prior distribution lump sum value?

A. Yes.

Q. And one of the things that I think you said on your direct exam, one of the things wrong with that is there was some intrinsic time value of money that was omitted from that concept; is that right?

A. Yes, that's correct.

Q. So in fairness, to account for that, you would have to do some actuarial equivalence of that lump sum amount to account for its value to Mr. Clair today?

A. Yes.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

PAUL J. FROMMERT, et al., Plaintiffs	)	0 0-CV-6311 (L)
vs.	)	
	)	Rochester,
	)	New York
SALLY L. CONKRIGHT, et al., Defendants.	)	July 12, 2006 10:30 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

ROBERT H. JAFFE &
ASSOCIATES, P.A.
BY: ROBERT H. JAFFE, ESQ.
8 Mountain Avenue
Springfield, New Jersey
07081

- and -

SCHELL & SCHELL, P.C.
BY: GEORGE A. SCHELL, ESQ.
410 Perinton Hills Office Park
Fairport, New York 14450

Appearing on behalf of the Plaintiffs

NIXON PEABODY, LLC
BY: MARGARET A. CLEMENS, ESQ.
Clinton Square, P.O. Box 31051
Rochester, New York 14603
Appearing on behalf of the Defendants

COURT REPORTER: RMR, CRR, CRI — Christi A. Macri, FAPR,

Kenneth B. Keating Federal Building
100 State Street
Rochester, New York 14614-0222

* * * * *

DEFENDANTS' WITNESS, LAWRENCE J. SHER, SWORN

DIRECT EXAMINATION

BY MS. CLEMENS:

Q. Mr. Sher, could you explain to the Court what your educational background is?

A. Yes. I graduated Rutgers University in 1973 with a bachelor's of arts in mathematics.

Q. Do you have any further education post graduate?

A. Yes. I'm a fellow of the Society of Actuaries, which involved taking and passing a series of examinations, 10 of them in total, over a period of several years which then, you know, qualified me as an actuary.

Q. Now, are you also an enrolled actuary?

A. Yes, I am.

* * * * *

THE COURT: Well, isn't this really just similar to Mr. Cofield's suggestion, except under the Layaou approach the actual sum received earlier is used as an offset and it's not unlimited? It's capped at 30 years?

I mean, isn't this the same approach except Cofield didn't use the actual sum taken, he just used the plan?

THE WITNESS: That's one of the differences, Your Honor. But there's another important difference, and that is under the Cofield approach, there isn't this disregarding time value of money.

In fact, that's why Mr. Cofield, I think, felt comfortable with saying that he felt that it was an actuarial approach that the time value of money was not just totally disregarded because he's working with an annuity, all right?

So what he did was -- what Mr. Cofield did was he took the annuity that the individual had earned under the defined benefit formula -- that is the lower line, the lower solid line that we see in this graph. He took that annuity that he -- you know, that one is able to calculate once one gets all the data.

I know that's, you know, that's been an issue, but once one gets the data, the person -- when they originally left, their first termination, they had an average pay and they had years of service, you know, 1.4%, calculate that benefit, that's an annuity. That is an amount that is defined as an age 65 benefit.

So he has not done what the Jaffe/Layaou approach did and that is to take a lump sum at an earlier point in time and convert it to, you know, and assume that that lump sum or treat that lump sum as if -- if he were determining a lump sum later on. That's the same number.

And that's just -- so when you convert an annuity to a lump sum or a lump sum to an annuity, in reflecting the time value of money, it's standard actuarial and economic practice, as far as I know, to reflect the fact that they either start or are payable at different points in time.

The easiest way to see it maybe is with a lump sum. If I have a $10,000 lump sum someone's entitled to at age 65. Well, if they're age 65 currently, they get $10,000.

You know, if they're age 50 currently, it's going to be lower than that. If they're 40, it's going to be even lower than that.

That's -- it's something that is standard practice, and it's actually required for determining lump sums for ERISA plans that you follow these rules.

So what Mr. Jaffe's done is he's -- he's just taken that dollar amount of lump sum and treated it as if it would have the same value at age 65, even though we know under any reasonable assumption for time

value of money it would be worth much more 20 or however many years later.

BY MS. CLEMENS:

Q. And in doing the approach that you take the -- only deduct from the amount of the highest average pay formula the actual dollar amount of the prior distribution, is that an actuarial or economically sound way to account for that prior distribution?

A. No, and this is one area where Mr. Cofield and I are in complete agreement.

I think it's very clear that when you asked him yesterday about whether he felt that was, you know, an actuarial approach, he said no. You know, for reasons -- the same reasons that he stated, I agree, it's not.

Q. And would this have resulted in any windfalls to the plaintiff?

A. Well, certainly from my perspective it would. You know, of course, it's, you know, it's a matter of how you define windfalls.

But to the extent that windfalls -- that the intent is to take into account a prior distribution and the economic value that it has, to the extent that that economic value is understated by not reflecting the time value of money, it creates a disparity which would -- understating the offset, then you're overstating the net benefit.

Q. Let me ask you this question: Is it -- when you are reflecting the time value of money in accounting for the prior distribution, is that the same as phantom accounting as it's used in the plan?

A. Certainly not my understanding, and I would not view that as phantom accounting, no.

* * * * *

THE COURT: Okay. I guess I don't quite understand why Mr. Frommert should be able to calculate at the, you know, using the 1.4 formula, which at his retirement age will give him the greatest benefit, whether it's annuity or lump sum, I don't quite understand -- which appears to be what Mr. Jaffe did or what the Layaou approach did initially, you know. What gets subtracted from that or offset from it I guess is another matter.

Did you understand my question?

THE WITNESS: I think I do, Your Honor.

THE COURT: Because the other --

THE WITNESS: The other matter really is the matter, I think. He is getting, and is entitled certainly, to the full benefit under -- subject to the 30 year maximum -- to the average pay formula, which is -- which would get him, you know, if he had never received any distribution before, would get him actually the $456,000, not 306.

But the fact is that he received the 145,000, he received it a long time ago. And to take something today, 456,000, and subtract from it 145,000, which is 21 years old value, inflates that differential, the differential being 306,000.

That's what's causing that number to be so big is the -- disregarding the reason that both Mr. Cofield and I objected, this approach is disregarding the fact that a dollar, you know, today is not worth as much

as a dollar tomorrow, or a dollar today is worth, you know, you know, something different.

And it's -- you just -- you can't -- if you just take the same dollar amount, you are -- it is a, you know, it's a windfall. I mean, it's just not -- it just defies not just actuarial science, but basic economics.

That's what's causing this number to, you know, to be so large. It's the offset and that's, you know, that's, of course, the subject of this.

THE COURT: So if the employee, say, took $141,000 previously when he left -- because I think you indicated was the case with Mr. Frommert -- you're saying that you can't just subtract that? You have to subtract 141,000, you have to add something to it to reflect what you say is the value of money over time?

THE WITNESS: Yes, Your Honor, that's exactly right.

THE COURT: But to get him 141,000 as a lump sum, it's based on a higher number? I mean -- or a lower number?

In other words, how do you get the 141,000?

THE WITNESS: The 141,000 in his case was his distribution from the profit sharing plan at the time.

THE COURT: Okay.

THE WITNESS: As we pointed out, that's everybody who received it, received their profit sharing balance.

MS. CLEMENS: That's currently reflected in the TRA, the transitional retirement account --

THE WITNESS: Right.

MS. CLEMENS: -- is what you're referring to as the profit sharing account; is that right?

THE WITNESS: That's right.

THE COURT: If that's being offset or attempted to be offset, in your view, against the sum he wants to take now under the defined benefit plan, isn't that a problem?

THE WITNESS: The problem is that they're at different points in time. So today you're looking at age 67 finding the lump sum value at age 6 --

THE COURT: They're different plans, too, though? Different parts of the plan?

THE WITNESS: Well, different parts of the arrangement, but the arrangement calls for, you know, you get what's attributable to the profit sharing or TRA as it, you know, after it was converted. And then to the extent that there's any excess from the floor benefit, you get that.

So, you know, the individual is sort of in a win/win situation. If they leave early on, they get -- going back to that earlier table, you know, they get the higher profit sharing. If they stay until later, they get the higher defined benefit. I mean, after it crossed over.

So, in my opinion, what this does is it creates -- creates disparities, you know.

THE COURT: Well, of course you understand that I -- because of the Second Circuit's decision, I am not charged with teaching a course in actuarial science. I'm trying to produce a remedy, focusing on

what the employees had available to them, the SPD and the 1989 plan.

And, you know, what is better or not from an actuarial point of view may not be the final answer to me. I'm stuck, if you will, with the descriptions that were put here.

And maybe the test is what an objectively reasonable employee would anticipate after looking at the SPD and the plan.

You see the distinction there?

THE WITNESS: I do, Your Honor. You know, I'm not suggesting that necessarily just because something is -- is actuarially sound that it's, you know, the way you have to go.

One thing that did strike me in yesterday's testimony when Mr. Clair testified, he's an MBA and he recognized that there's -- there's a thing, you know, a time value of money.

That if you have $145,000 at one point in time, it's worth a lot more than $145,000, you know, later on. I mean, what you -- you know, you're looking at it 20 years later.

There's a fundamental concept that he recognized, and I think Mr. Cofield certainly recognized -- because he felt this method was, you know, had problems, at least again, you know, again, at least from an actuarial perspective, you know.

Partly what this is intended to do is to sort of take this beyond just the arcane actuarial discussion, which I realize is arcane, to try to put a practical, you know, to make something practical out of it.

So when we look at this 306,000, you know, it is -- it just does seem, at least seems to me, to be very large in relationship to the five years of service that he received, so much larger than anyone else in the plan.

So the attempt is to just not throw a bunch of actuarial stuff at the Court, but to show the practical effect of using that method or any method.

* * * * *

Q. Now, does that type of A plus B approach with that 30 year cap suffer from the same type of deficiencies or issues that you had with the approach Mr. Cofield advanced here during his testimony which he said was based on 9.6 of the plan?

A. Well, I think it certainly does not suffer -- suffer the same type of time value of money problem that the Jaffe/Layaou approach I think clearly suffers from.

It doesn't, you know, with regard to the Abar approach, it's -- it doesn't, you know, it has some elements and creates some, you know, some situations that might not, you know, that might be questionable. But, again, it doesn't suffer nearly to the same degree.

Q. When you say some situations that may be "questionable," what do you mean?

A. Well, you know, you -- when you reflect the fact that in the first period of employment all of these people received this extra profit sharing account, that it was over and above what the pension plan, you know, the 4.3a, the highest average

formula provided, the fact is they received that money.

If they had never left, you know, and retired years later, all they would get -- when the defined benefit plan crosses over and becomes higher, all they would get would be the defined benefit plan.

So in a sense what -- there's the potential for a double counting, in effect. In other words, it's kind of like if everybody could split their career in half and calculate their benefit for part A; and then for part B most people -- almost everybody would end up doing better than the calculation for an employee who stayed all the way through where you didn't split it up into two pieces.

And that's because you got the, you know, the extra amount in the early years under the defined contribution plan, you got the extra amount in the later years in the defined benefit plan. They would combine to give someone more potentially, you know, than somebody who just stayed all along.

Q. Okay. And I believe it was --you said it didn't suffer to the same degree as using the approach that's on here as -- listed as the Jaffe approach; is that right?

* * * * *

	Name	dob	doh	"Paid" Date	No Remedy	Our Offset Approach No 59 Cutoff	Our Offset Approach 59 Cutoff	New Hire 59 year total 59 Cutoff	New Hire 59 year total No 59 Cutoff	New Hire 59 year Future No 59 Cutoff	Auth Layers	Actual TBA
Active	Banayan, Linda S.	10/27/1948	11/09/1976	9/1/2009	88,975	83,975	91,975	88,975	188,848	188,848	383,841	-
Active	Young, David K.	10/29/1945	5/29/1970	9/1/2009	286,848	274,292	288,888	288,888	573,699	273,699	489,918	81,988
Active	Tobin, Frances P.	3/13/1951	2/19/1973	9/1/2009	244,830	244,830	244,830	244,830	311,448	288,818	448,383	88,811
Active	Revello, Nancy A.	2/20/1956	10/29/1975	9/1/2009	108,988	108,988	108,988	108,988	108,988	108,988	138,548	14,179
Active	Rosendale, Lynn B.	9/20/1947	10/27/1980	9/1/2009	278,488	287,839	278,488	875,488	278,488	488,889	482,997	330,753
Active	Le Van, Kathleen W.	12/9/1948	9/1/1979	9/1/2009	-	38,488	18,888	18,888	58,303	58,303	73,898	-
Active	Lasher, William J.	8/4/1944	8/17/1970	9/1/2009	-	83,988	87,883	72,840	188,840	188,840	286,828	-
Active	Updyke, Eugene H.	9/23/1948	8/14/1979	9/1/2009	-	88,887	4,874	4,874	180,900	180,900	208,088	-
Active	Loughlin Jones, Maureen A	7/5/1952	6/30/1975	9/1/2009	61,728	101,888	73,018	83,897	188,888	188,854	231,901	64,814
Active	Wunsch, Leslie A.	8/9/1949	12/28/1971	9/1/2009	18,988	64,487	48,988	87,834	180,987	181,887	181,109	15,988
Active	Mc Connell, Rhonda H.	12/10/1948	6/8/1971	9/1/2009	181,488	818,887	181,488	181,488	228,188	226,178	291,905	64,938
Active	Mastodimos, Andrew C.	7/4/1947	9/30/1979	9/1/2009	188,088	803,888	180,088	180,088	188,840	188,840	288,908	18,818
Active	Carwardine, Robert P.	5/19/1953	9/4/1979	9/1/2009	88,888	43,888	88,888	88,888	88,547	88,547	101,488	-
Active	Edelmann, Jean A.	8/14/1954	8/13/1979	9/1/2009	80,440	88,088	37,889	44,880	88,884	88,884	113,184	80,440
Active	Brown, Kathleen A.	7/29/1954	11/1/1978	9/1/2009	-	14,448	8,481	8,481	37,384	37,384	88,837	-
Active	Plastaras, Dale T.	11/28/1964	9/28/1979	9/1/2009	188,388	188,388	188,838	188,888	188,858	188,878	284,878	-
Active	Solis, Carmen J.	11/28/1958	10/28/1978	9/1/2009	4,587	88,848	38,888	38,834	88,181	88,181	107,888	4,587
Active	Spencer, Craig R.	11/1/1956	6/18/1988	9/1/2009	108,885	188,088	188,088	103,088	188,088	108,088	118,888	-
Active	Sargent, Mary A.	9/18/1947	11/30/1970	9/1/2009	78,388	78,388	78,388	78,388	105,222	105,233	170,427	-
Active	Panchbhia, Anandi G.	9/5/1950	8/16/1971	9/1/2009	-	88,888	82,387	82,387	148,888	148,888	88,841	-
Active	Horendia, Michael	1/30/1947	9/1/1970	9/1/2009	-	48,884	18,378	17,334	171,810	171,810	283,849	-
Active	Mitchell Jr, Harold S.	9/19/1948	10/9/1973	9/1/2009	788	184,810	43,888	87,788	188,778	188,778	288,308	788
Active	Chait, Alan H.	7/31/1948	12/1/1970	9/1/2009	281,708	281,708	281,788	281,788	481,881	848,728	818,181	48,788
Active	Karra, Terence J.	12/27/1948	9/18/1989	9/1/2009	88,979	88,848	87,887	184,387	280,818	852,110	873,888	88,979
Active	Thornton, Crystal J.	9/30/1948	10/13/1980	9/1/2009	184,588	188,884	184,888	184,878	818,788	870,081	818,388	(88,588)
Active	Thompson, Kenny F.	1/18/1988	7/7/1980	9/1/2009	-	88,888	18,847	18,847	84,888	84,888	88,838	-
Active	Wright, Joseph E.	8/2/1944	4/8/1989	9/1/2009	888,118	888,118	888,118	888,118	888,118	487,081	418,388	888,118
Active	Albert, Matthew D.	12/28/1988	7/18/1978	9/1/2009	-	88,888	7,418	7,418	88,878	88,878	184,788	-
Active	Darling Jr, Frank C.	12/18/1948	8/28/1988	9/1/2009	88,888	87,888	88,781	188,848	184,788	841,878	817,187	88,888
Active	Mc Coy, Michael J.	10/18/1948	8/18/1970	9/1/2009	88,787	88,818	88,487	183,888	281,888	881,881	488,878	88,784
Active	Lipani, Donna S.	8/1/1952	8/28/1978	9/1/2009	-	81,814	4,188	4,188	88,888	88,888	88,748	-
Active	Chesbrough, William J.	4/18/1948	8/17/1988	9/1/2009	188,184	841,787	188,184	188,184	280,848	888,118	458,887	118,188
Active	Zeiss, Dennis E.	12/18/1947	8/18/1987	9/1/2009	88,888	88,888	88,888	88,888	88,888	88,884	88,888	-
Active	Bowers, Michael S.	3/4/1948	8/18/1987	9/1/2009	888,188	888,188	888,188	884,188	887,788	888,448	884,888	888,188
Active	Sauerhoist, Frederick A.	8/18/1944	11/28/1988	9/1/2009	142,948	142,948	142,948	188,884	888,184	880,948	847,888	88,187
Active	Roth, Benjamin C.	6/28/1941	9/83/1984	9/1/2009	-	78,888	48,448	88,878	188,881	227,888	888,848	-
Active	Lehlandt, Charles	12/28/1938	7/27/1970	9/1/2009	-	88,488	88,187	118,881	887,888	887,888	488,788	-
Active	Nasseem, Gail A.	6/8/1948	11/8/1978	9/1/2009	178,884	888,484	178,884	178,884	277,883	277,888	448,878	4,884
Active	Wells, James G.	1/13/1951	8/8/1981	9/1/2009	888,848	888,848	888,848	888,848	888,848	888,848	887,884	-
Active	Hardin, Gary P.	8/1/1948	8/8/1988	9/1/2009	-	88,888	88,188	88,788	184,188	184,188	888,881	-
Active	Kalatah, Bassim	1/28/1988	1/18/1974	9/1/2009	848,188	881,848	848,188	841,188	488,874	818,488	888,781	188,088
Active	Sevcin, Floyd G.	6/18/1948	8/1/1987	9/1/2009	888,188	888,188	888,188	888,188	888,884	884,471	1,188,888	
Active	Murphy, Betsy J.	10/28/1948	8/28/1977	9/1/2009	-	88,888	8,888	8,878	88,488	88,488	188,888	-
Active	Gallagher, Lawrence J.	8/1/1941	12/28/1884	9/1/2009	888,184	488,888	888,184	888,184	488,808	888,488	1,008,181	88,418
Active	Hunter, Kathleen E.	8/31/1987	8/1/1988	9/1/2009	88,488	88,488	88,488	88,488	88,844	88,844	118,888	11,878
Active	Cathcart, Joyce D	8/1/1944	8/8/1978	9/1/2009	188,088	178,488	188,888	188,888	888,888	888,888	887,884	-
Active	Bradshaw, Robert L.	12/18/1941	12/28/1978	9/1/2009	118,288	184,588	118,884	118,884	888,648	888,648	888,187	-
Term Not Paid	Pusto, Donald S.	8/4/1947	6/28/1988	9/1/2009	-	48,888	88,887	87,188	74,881	74,881	184,481	-
Term Not Paid	White, Candice J.	10/31/1948	8/8/1988	9/1/2009	18,981	114,117	88,981	70,988	148,871	148,871	887,888	18,887
Term Not Paid	Vasta, Thomas M.	7/8/1984	8/24/1971	9/1/2009	88,888	82,258	44,887	78,088	188,878	188,878	188,858	88,888
Term Not Paid	Campbell, Ronald L.	4/18/1941	11/15/1971	9/1/2009	88,188	81,884	88,888	80,888	184,878	184,878	884,888	7,888

9/1/2009 employees not paid but accrued for calculations

BEST AVAILABLE COPY

3/1/2006 Inflation not paid but accrued for calculations

	Name	dob	doh	"Test" Date	No Remedy	One Offset Approach No 65 Cutoff	One Offset Approach 65 Cutoff	New Hire 35 year total No 65 Cutoff	New Hire 35 year total 65 Cutoff	New Hire 35 year Future No 65 Cutoff	Jaffe Legacy	Annual TRA
Term Not Paid	Dingman, Clark C.	5/5/1951	6/1/1970	3/1/2006	-	99,995	92,150	97,155	89,109	98,109	87,522	-
Term Not Paid	Mc Gee, Theresa F.	8/14/1957	4/11/1999	3/1/2006	-	167,781	68,259	147,624	348,053	363,339	712,529	-
Term Not Paid	Willette, Charles F.	9/29/1943	6/1/1997	3/1/2006	31,458	197,049	98,589	183,384	281,567	301,997	539,527	31,458
Term Not Paid	Johnson, Patricia M.	9/20/1952	5/5/1971	3/1/2006	6,092	98,935	73,579	81,038	148,530	151,625	278,538	6,092
Term Not Paid	Pasemont, Paul J.	8/11/1950	12/31/1980	3/1/2006	3,135	74,078	57,960	67,838	74,078	157,127	305,364	3,135
Term Not Paid	Allen, Mary B.	8/8/1954	6/6/1974	3/1/2006	108,113	183,038	108,113	169,414	178,868	178,868	382,584	56,970
Term Not Paid	Pursell, Kenneth P.	9/29/1946	4/1/1974	3/1/2006	-	20,702	5,804	5,804	20,563	20,563	120,927	-
Term Not Paid	Dallas, Paul	8/30/1942	1/16/1967	3/1/2006	-	41,986	4,007	4,007	104,979	104,979	481,279	-
Term Not Paid	Barnes, Thomas I.	12/9/1946	2/17/1969	3/1/2006	17,566	92,796	51,831	87,016	130,981	130,981	230,068	17,566
Term Not Paid	Barbosa, Napoleon R.	1/7/1950	4/30/1976	3/1/2006	40,046	81,810	50,656	81,187	90,800	90,800	134,000	40,043
Term Not Paid	Dalton, Thomas E.	12/2/1943	6/5/1971	3/1/2006	-	45,811	34,979	30,495	127,139	127,139	371,504	-
Term Not Paid	Taylor, Martha-Lee	9/27/1953	12/3/1998	3/1/2006	60,111	80,054	60,111	60,111	60,111	60,111	100,954	-
Term Not Paid	Johnston, Patricia H.	4/15/1947	9/5/1968	3/1/2006	-	28,700	16,419	38,545	63,999	63,999	108,754	-
Term Not Paid	Pruett, Joyce M.	10/7/1948	1/30/1978	3/1/2006	-	17,616	17,621	29,498	30,881	30,821	50,485	-
Term Not Paid	Long, Charlotte M.	9/15/1958	3/8/1987	3/1/2006	67,980	87,980	87,980	87,980	87,980	87,980	101,676	97,980
Term Not Paid	Farrell, James J.	8/8/1950	8/8/1978	3/1/2006	-	97,723	61,318	81,534	214,048	214,048	344,504	-
Term Not Paid	Bohon, David M.	8/15/1941	8/13/1967	3/1/2006	-	48,990	40,194	98,942	178,389	205,982	378,119	-
Term Not Paid	Morrillon, Julie A.	8/1/1958	8/13/1988	3/1/2006	-	30,930	23,155	48,810	60,382	60,382	104,080	-
Term Paid	Hinkmeh, F.Colton C.	1/31/1953	8/16/1977	4/6/2001	61,033	61,033	61,052	61,052	70,103	70,103	135,641	-
Term Paid	Hamlett, Alexander W.	12/11/1943	8/4/1974	6/6/2005	109,430	146,590	109,489	109,430	167,090	167,090	280,208	-
Term Paid	White Kehoe, Molly M.	4/30/1948	7/30/1978	3/4/2006	104,443	116,579	108,812	117,315	144,495	144,495	181,089	104,443
Term Paid	Gatta, Edna L.	5/30/1943	12/27/1968	9/7/1999	9,410	68,068	66,935	108,771	110,109	181,881	317,731	9,410
Term Paid	Reddish, David B.	5/5/1941	8/29/1971	11/10/2000	-	73,288	58,148	108,922	181,195	181,195	308,113	-
Term Paid	Burley, Steven D.	5/30/1942	12/10/1978	6/6/2006	130,539	130,539	130,539	130,539	139,350	139,350	208,851	-
Term Paid	Craven, William A.	7/10/1947	8/30/1969	1/30/1999	66,991	66,991	66,991	66,827	60,069	60,069	73,804	39,034
Term Paid	Mawdsley, Frank	1/30/1939	5/4/1970	5/5/1999	4,758	66,350	60,075	118,148	187,827	187,827	256,035	4,753
Term Paid	Johnson, Vincent G.	4/30/1941	1/13/1970	8/10/1999	41,273	64,277	64,277	112,656	117,984	117,984	200,083	41,273
Term Paid	Plummer, William S.	9/10/1958	12/15/1980	5/3/2000	158,507	158,507	158,507	158,507	173,364	173,364	205,418	158,507
Term Paid	Cohen, Bernie	12/14/1942	4/3/1973	9/5/1996	66,660	66,179	66,130	100,512	101,084	101,084	138,658	66,660
Term Paid	Levy, Gail J.	11/8/1958	6/3/1986	10/1/1999	72,532	278,339	274,981	278,109	278,047	278,047	508,158	72,532
Deceased Paid	Tabak, Bernie S.	10/10/1944	1/31/1977	8/31/2002	71,777	71,777	71,777	77,479	71,777	71,777	122,784	-
Deceased Paid	Gibbs, Richard J.	8/24/1953	6/19/1977	3/28/1997	-	39,997	39,997	39,997	39,997	39,997	74,141	-
Deceased Paid	Adams, Alva M.	3/11/1947	1/8/1978	9/30/2002	-	27,144	5,688	5,328	75,840	75,840	158,666	-
					8,743,118	9,957,135	8,338,693	9,847,457	14,988,838	15,908,267	24,976,477	2,706,278
						5,214,000	1,490,564	5,806,968	7,623,681	9,152,329	17,581,550	

PETITIONER'S BRIEF

(9)

No. 08-810

Supreme Court, U.S.
FILED
SEP 14 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR THE PETITIONERS

MICHAEL D. RYAN
XEROX CORPORATION
45 Glover Avenue
Norwalk, CT 06856

MARGARET A. CLEMENS
NIXON PEABODY LLP
Clinton Square
P.O. Box 31051
Rochester, NY 14603

ROBERT A. LONG, JR
ROBERT D. WICK
Counsel of Record
RICHARD C. SHEA
ROBERT S. NEWMAN
JONATHAN L. MARCUS
CHRISTIAN J. PISTILLI
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Petitioners

September 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 51 BGP

QUESTIONS PRESENTED

1. Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other Circuits, that a district court has no obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits.

2. Whether the Second Circuit erred in holding, in conflict with decisions of other Circuits, that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners in this case are present or former Xerox Corporation Pension Plan Administrators Sally L. Conkright, Patricia M. Nazemetz, and Lawrence M. Becker, as well as the Xerox Corporation Retirement Income Guarantee Plan. None of the Petitioners is a corporation, and, therefore, no Petitioner has issued any stock that is owned by any publicly-traded company. Xerox Corporation, which is no longer a party to this case, is a publicly-held company.

The Respondents in this case are Paul J. Frommert, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillian, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski, Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Kenneth W. Pietrowski,

Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Dennis E. Bains, Kathleen E. Hunter, John L. Crisafulli, Deborah J. Davis, Brenda H. McConnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Claudette M. Long, Dale Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Carter, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Gail J. Levy, John A. Williams, Crystal Thorton, Charles R. Drannbauer, William M. Burritt, and Janice Ross Heiler.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 20

ARGUMENT 26

I. A PLAN ADMINISTRATOR'S EXERCISE OF DISCRETIONARY POWERS CONFERRED BY AN ERISA PLAN IS SUBJECT TO A DEFERENTIAL STANDARD OF REVIEW 26

A. This Court's Decisions Apply A Deferential Standard of Review To Discretionary Interpretations By A Plan Administrator. 26

B. A Deferential Standard Of Review Furthers Important Objectives Of ERISA. 28

C. *Firestone* Deference Is Not Restricted To Formal "Decisions" On Benefits Claims. 32

D. A Conflict Of Interest Does Not Change The Standard Of Review. 36

E. Absent A Finding Of Bad Faith, A Mistake Does Not Strip The Plan Administrator Of Discretionary Authority Conferred By The Plan..... 38

1. Absent Bad Faith Or Similar Misconduct, Trust Law Does Not Strip A Trustee Of Discretion Based Upon A Mistake. 39

2. Stripping A Plan Administrator's Discretion Absent Bad Faith Would Be Inconsistent With ERISA's Objectives. 47

3. The Plan Administrator Did Not Interpret The "Same" Plan Terms On Remand. 50

4. The Contention That The Plan Is "Silent" Is Incorrect And Inapposite..... 51

II. ABSENT DEFERENCE TO THE PLAN ADMINISTRATOR, A CLAIM FOR BENEFITS DUE UNDER THE TERMS OF AN ERISA PLAN IS SUBJECT TO *DE NOVO* REVIEW..... 53

A. The Court Of Appeals Erred By Applying A Deferential Standard Of Review To The District Court's Interpretation Of The Plan. 54

B. Under A *De Novo* Standard Of Review, The Plan Should Be Interpreted To Account For The Time Value Of Money In Calculating Respondents' Benefits Under The Plan. 58

CONCLUSION 63

STATUTORY APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

AT&T Corp. v. *Hulteen*, 129 S. Ct. 1962 (2009) 31

Adams v. *Thiokol Corp.*, 231 F.3d 837 (11th Cir. 2000) 32

Administrative Committee of the Wal-Mart Associates Health & Welfare Plan v. *Willard*, 393 F.3d 1119 (10th Cir. 2004) 35

Benefits Committee of Saint-Gobain Corp. v. *Key Trust Co. of Ohio*, 313 F.3d 919 (6th Cir. 2002) 61

Berger v. *AXA Network LLC*, 459 F.3d 804 (7th Cir. 2006) 58

Berry v. *Ciba-Geigy Corp.*, 761 F.2d 1003 (4th Cir. 1985) 29

Booth v. *Wal-Mart Stores, Inc. Associates Health & Welfare Plan*, 201 F.3d 335 (4th Cir. 2000) 54-55

Brubaker v. *Metropolitan Life Insurance Co.*, 482 F.3d 586 (D.C. Cir. 2007) 54

Central States, Southeast and Southwest Areas Pension Fund v. *Central Transport, Inc.*, 472 U.S. 559 (1985) ..... *passim*

CFTC v. *Levy*, 541 F.3d 1102 (11th Cir. 2008) 56

Colton v. *Colton*, 127 U.S. 300 (1888) 22, 39, 40, 46

Cooter & Gell v. *Hartmarx Corp.*, 496 U.S. 384 (1990) 57

Dang v. *UNUM Life Insurance Co. of America*, 175 F.3d 1186 (10th Cir. 1999) 55

Duthie v. *Matria Healthcare, Inc.*, 540 F.3d 533 (7th Cir. 2008) 56

Eddy v. *Prudence Bonds Corp.*, 165 F.2d 157 (2d Cir. 1947) 54

Egelhoff v. *Egelhoff*, 532 U.S. 141 (2001) 58

Evans v. *Eaton Corp. Long Term Disability Plan*, 514 F.3d 315 (4th Cir. 2008) 30

Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989) ..... *passim*

Gallo v. *Amoco Corp.*, 102 F.3d 918 (7th Cir. 1996) 35, 51, 52-53

Halbach v. *Great-West Life & Annuity Insurance Co.*, 561 F.3d 872 (8th Cir. 2009) 56

Harms v. *Cavenham Forest Industries, Inc.*, 984 F.2d 686 (5th Cir. 1993) 61

Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) 5

Hunter v. *Caliber System, Inc.*, 220 F.3d 702 (6th Cir. 2000) 36

Izzarelli v. *Rexene Products Co.*, 24 F.3d 1506 (5th Cir. 1994) 35

Kennedy v. *Plan Administrator for DuPont Savings and Investment Plan*, 129 S. Ct. 865 (2009) 30-31

Kmatz v. *Metropolitan Life Insurance Co.*, 232 Fed. Appx. 451 (6th Cir. 2007) 36

LaRue v. *DeWolff, Boberg & Associates, Inc.*, 128 S. Ct. 1020 (2008) 4

Larocca v. *Borden, Inc.*, 276 F.3d 22 (1st Cir. 2002) 56-57

Litton Finanical Printing Division v. *NLRB*, 501 U.S. 190 (1991) 57

Lockheed Corp. v. *Spink*, 517 U.S. 882 (1996) 28

Lunn v. *Montgomery Ward & Co.*, 166 F.3d 880 (7th Cir. 1999) 5, 60

McDonald v. *Provident Indemnity Life Insurance Co.*, 60 F.3d 234 (5th Cir. 1995) 35

Mertens v. *Hewitt Associates*, 508 U.S. 248 (1993) 47

Metropolitan Life Insurance Co. v. *Glenn*, 128 S. Ct. 2343 (2008) ..... *passim*

Miller v. *Xerox Corp. Retirement Income Guaranty Plan*, 464 F.3d 871 (9th Cir. 2006) 9

Moench v. *Robertson*, 62 F.3d 553 (3d Cir. 1995) 31, 36

Nachman v. *PBGC*, 446 U.S. 359 (1980) 3

Negusie v. *Holder*, 129 S. Ct. 1159 (2009) 49

Nichols v. *Prudential Insurance Co. of America*, 406 F.3d 98 (2d Cir. 2005) 18-19

Oliver v. *Coca-Cola Co.*, 546 F.3d 1353 (11th Cir. 2008) 48, 51

Pakovich v. *Broadspire Services, Inc.*, 535 F.3d 601 (7th Cir. 2008) 34-35, 48, 51

Pete v. *United Mine Workers of America Welfare & Retirement Fund of 1950*, 517 F.2d 1275 (D.C. Cir. 1975) 43, 48, 51

Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. *Hendon*, 541 U.S. 1 (2004) 30

Thomas v. *SmithKline Beecham Corp.*, 297 F. Supp. 2d 773 (E.D. Pa. 2003) 32

Varity Corp. v. *Howe*, 516 U.S. 489 (1996) 47, 58

Vizcaino v. *Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) 23, 48-49, 51

White v. *Sundstrand Corp.*, 256 F.3d 580 (7th Cir. 2001) 7

Worthy v. *New Orleans Steamship Association/International Longshoremen's, AFL-CIO Pension Plan*, 342 F.3d 422 (5th Cir. 2003) 35

Yolton v. *El Paso Tennessee Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006) 56

Young v. *Verizon's Bell Atlantic Cash Balance Plan*, 575 F. Supp. 2d 892 (N.D. Ill. 2008) 32

STATE CASES

In re Brown, 29 A.2d 52 (Pa. 1942) 42

Collister v. *Fassitt*, 57 N.E. 490 (N.Y. 1900) 43

Eaton v. *Eaton*, 132 A. 10 (N.H. 1926) 40-41

Elward v. *Elward*, 232 P. 240 (Kan. 1925) 43

Emmert v. *Old National Bank of Martinsburg*, 246 S.E.2d 236 (W. Va. 1978) 45

In re Estate of Manahan, 125 N.W.2d 135 (Iowa 1963) 45

In re Estate of Marre, 114 P.2d 586 (Cal. 1941) 42

In re Estate of Trevino, 886 N.E.2d 530 (Ill. App. Ct. 2008) 56

Finch v. *Wachovia Bank & Trust Co., N.A.*, 577 S.E.2d 306 (N.C. Ct. App. 2003) 42-43

In re Hafemann's Will, 62 N.W.2d 561 (Wis. 1954) 45

Hanford v. *Clancy*, 183 A. 271 (N.H. 1936) 41

Manning v. *Sheehan*, 133 N.Y.S. 1006 (N.Y. Sup. Ct. 1911) 41-42

Old Colony Trust Co. v. *Rodd*, 254 N.E.2d 886 (Mass. 1970) 42

Schofield v. *Commerce Trust Co.*, 319 S.W.2d 275 (Mo. 1958) 45

In re Sullivan's Will, 12 N.W.2d 148 (Neb. 1943) 41

Woodward v. *Dain*, 85 A. 660 (Me. 1913) 45

FEDERAL STATUTES AND REGULATIONS

26 U.S.C. § 411 6

28 U.S.C. § 1254 1

28 U.S.C. § 1291 1

29 U.S.C. § 1002 ..... 3, 4, 5

29 U.S.C. § 1021 3
29 U.S.C. § 1022 3
29 U.S.C. § 1023 3
29 U.S.C. § 1024 3
29 U.S.C. § 1025 3
29 U.S.C. § 1102 ..... 4, 29
29 U.S.C. § 1104 30
29 U.S.C. § 1109 36
29 U.S.C. § 1132 ..... *passim*
26 C.F.R. § 1.401(a)(4)-8 62
Revenue Ruling 76-259, 1976-2 C.B. 111 ..... 6, 8, 62

MISCELLANEOUS

120 Cong. Rec. 29,941 (1974), *reprinted in* III Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. Legislative History 3599 29

H.R. 2, 93d Cong. § 691 (1974), 120 Cong. Rec. 5001 (1973), *reprinted in* III Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. Legislative History 3599 29

H.R. Rep. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639 28

H.R Rep. No. 93-807 (1973), 1974 U.S.C.C.A.N. 4670 31

S. 1179, 93d Cong. § 602 (1973), *reprinted in* I Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. Legislative History 29

S. Rep. No. 93-383 (1973), *reprinted in* I Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. Legislative History 1063 29

G. Bogert & G. Bogert, The Law of Trusts and Trustees (2d ed. rev. 1980) 45

3 W. Fratcher & M. Ascher, Scott and Ascher on Trusts (5th ed. 2007) 39

3 W. Fratcher, Scott on Trusts (4th ed. 1988) .. *passim*

R. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 Fla. Tax Rev. 607 (2000) 5-6

3 R. Pierce, Administrative Law Treatise (4th ed. 2002) 49

Restatement (Second) of Trusts (1957) 43-45

Restatement (Third) of Trusts (2003) 44

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the Second Circuit is reported at 535 F.3d 111. Pet App. 1a-21a. An earlier opinion of the Second Circuit is reported at 433 F.3d 254. *Id.* at 22a-60a. The opinion of the district court on summary judgment is reported at 328 F. Supp. 2d 420. *Id.* at 61a-98a. The district court's remedies opinion is reported at 472 F. Supp. 2d 452. *Id.* at 99a-128a.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2008. *Id.* at 2a. The court of appeals had jurisdiction under 28 U.S.C. § 1291. The court of appeals denied a petition for rehearing on September 25, 2008. *Id.* at 129a-31a. In December 2008, Petitioners timely filed a petition for a writ of certiorari, which this Court granted on June 29, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 3, 402-05, 408-09 and 502-03 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002, 1102-05, 1108-09, 1132-33, and Internal Revenue Code § 411, 26 U.S.C. § 411, are reprinted in the appendix to this brief. *See* App., *infra*, 1a - 9a.

INTRODUCTION

When an ERISA plan confers discretion on the plan administrator, the administrator's decisions are entitled to deference. The ERISA plan at issue in this case confers broad discretion on the Plan Administrator to interpret the terms of the Plan and to rectify defects, omissions, and inconsistencies in the Plan.

The court of appeals initially held that a provision of the Plan could not be applied to Respondents because it had not been properly added to the Plan. It remanded to the district court for a determination of the benefits due under the remaining terms of the Plan. On remand, the Plan Administrator submitted a considered, written interpretation of the remaining Plan terms. The court of appeals erroneously refused to defer to that interpretation on the ground that it is a "mere *opinion*" that was not part of the original benefits determination. Pet. App. 13a.

Contrary to the court of appeals' decision, deference to plan administrators is not restricted to initial claims determinations. A hair-trigger rule that strips plan administrators of deference based on a good-faith mistake in the administration of a plan is not supported by ERISA or this Court's decisions, and would thrust federal courts into the role of making difficult and discretionary decisions under ERISA plans.

Having erroneously refused to defer to the Plan Administrator, the court of appeals committed a second error by deferring to the *district court's* interpretation of the remaining plan terms. No

deference was due to the district court because courts apply a *de novo* standard of review to interpretations of written instruments, as well as to claims for benefits due under the terms of an ERISA plan.

This case illustrates the untoward consequences of shifting discretion from experienced and expert plan administrators to courts, whose exposure to an ERISA plan is, at best, episodic and occasional. The district court's interpretation does not take account of relevant Plan terms. It also ignores a fundamental economic principle – the time value of money. As a result, it confers a windfall on Plan participants who left Xerox and returned at a later stage in their careers. The Plan Administrator's interpretation, in contrast, is grounded in the terms of the Plan, appropriately recognizes the time value of money, and avoids irrational windfalls.

STATEMENT OF THE CASE

1. ERISA and Plan Administrators. ERISA is a "comprehensive and reticulated statute." *Nachman* v. *PBGC*, 446 U.S. 359, 361 (1980). It subjects pension plans to a wide array of regulatory provisions, including provisions that require or authorize the plan to assign certain key responsibilities to the plan's "administrator." *See, e.g.*, 29 U.S.C. §§ 1021-25. ERISA provides that a plan's "administrator" is the person specifically designated by the plan as its administrator. *Id.* § 1002(16)(A). If no administrator is designated and the plan is maintained by a single employer, the employer is deemed to be the plan administrator. *See id.* § 1002(16)(A)-(B).

ERISA also requires a plan to have "one or more named fiduciaries." 29 U.S.C. § 1102(a)(1). Only named fiduciaries may engage in activities such as allocation and delegation of fiduciary responsibilities, appointment and direction of the plan's trustee, and review of benefit claims appeals. *See id.* §§ 1102(c)(3), 1103(a), 1105(c), 1133(2). ERISA expressly permits employers who sponsor plans, as well as their employees and agents, to serve as plan fiduciaries. *Id.* § 1108(c)(3).

2. Floor-Offset Arrangements. ERISA divides pension plans into two categories: defined contribution plans and defined benefit plans. In a defined contribution plan, a participating employee's benefit is based on an allocation of the plan's assets to an individual account maintained for that employee. *See* 29 U.S.C. § 1002(34). Each participating employee is credited with contributions that the employer or the employee make to the plan. In addition, the employee's account is adjusted, upward or downward, to reflect investment gains or losses.

Participants in defined contribution plans are not assured a fixed benefit at retirement. Instead, their retirement benefits depend on the plan's investment experience. *See LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1022 n.1 (2008). Participants in defined contribution plans thus stand to gain if the plan's investment experience is positive, but they also stand to lose if the plan's investment experience is negative.

Defined benefit plans, in contrast, provide a guaranteed benefit payable at retirement age. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439-41 (1999); *see also* 29 U.S.C. § 1002(35). The benefit typically is a monthly retirement annuity calculated by reference to the participant's salary and years of service. Participants in defined benefit plans generally are not exposed to the risk of investment losses by the plan, but have no opportunity to benefit if the plan has a favorable investment experience. *See Hughes*, 525 U.S. at 439-41.

"Floor-offset" arrangements allow employers to provide their employees with both the security of a defined benefit plan and the opportunity for investment gains available under a defined contribution plan. Under a typical floor-offset arrangement, employees participate in both a defined benefit plan and a defined contribution plan. The defined benefit plan establishes a minimum "floor" benefit that the employee is guaranteed to receive upon retiring. If the value of the employee's defined contribution account exceeds this floor, then the defined contribution plan provides the employee's entire retirement benefit, and no benefit is paid by the defined benefit plan. If, however, the defined contribution account's value falls below the floor benefit, the defined benefit plan makes up any shortfall. *See generally Lunn* v. *Montgomery Ward & Co.*, 166 F.3d 880, 883 (7th Cir. 1999) ("The purpose of [a floor-offset arrangement] is to provide, in the [defined benefit] component, insurance against the vagaries of securities investments [in the defined contribution] component. . . ."); R. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4

Fla. Tax Rev. 607, 669-70 (2000) (describing floor-offset arrangements).

Defined contribution plans express a participant's "accrued benefit" in the form of a single-sum account balance. *See* 26 U.S.C. § 411(a)(7)(A)(ii). Defined benefit plans, in contrast, usually express a participant's "accrued benefit" as an annuity beginning at the participant's normal retirement age – typically age 65. *See id.* § 411(a)(7)(A)(i). Thus, in order to offset a participant's accrued benefit in a defined benefit plan (expressed as an annuity beginning at normal retirement age) by the participant's accrued benefit in a corresponding defined contribution plan (expressed as an account balance), both benefits must be expressed in the same form (*i.e.*, both must be expressed either as retirement annuities or as account balances). *See* Pet. App. 148a-149a.

The Internal Revenue Service ("IRS") approved floor-offset arrangements more than 30 years ago. *See* Rev. Rul. 76-259, 1976-2 C.B. 111. Revenue Ruling 76-259 requires these arrangements to specify the "actuarial basis" that will be used to compare the account balance provided by the defined contribution component of the arrangement to the retirement annuity. *Id.* In addition, if a participant in a floor-offset arrangement receives a distribution from his or her defined contribution account before reaching retirement age, the Revenue Ruling requires the benefit payable at retirement age to be offset by the sum of (i) the annuity attributable to the employee's remaining account balance in the defined contribution account, plus (ii) the additional

annuity "that would have been provided by any prior distribution from the account balance." *Id.*

These requirements protect the integrity of floor-offset plans by ensuring that the value of an employee's retirement benefit will not vary depending upon whether the employee receives a distribution prior to retirement age. If pre-retirement distributions from an employee's defined contribution account were ignored or minimized in calculating the floor benefit provided by the defined benefit plan, an employee who received a prior distribution would have a smaller offset – and a correspondingly larger benefit – than a similarly situated employee who waited until retirement age to receive a distribution. *Cf. White* v. *Sundstrand Corp.*, 256 F.3d 580, 583-84 (7th Cir. 2001) (explaining that if early distributions are not properly taken into account, employees who leave before retirement age would "obtain a big advantage over those who stay," producing "a plan that treated workers staying through retirement age as suckers").

3. The Xerox Plan. The Plan at issue in this case provides that a "Plan Administrator . . . shall be appointed by the chief executive officer of [Xerox]" and that the Plan Administrator "is the administrator and named fiduciary of the Plan." J.A. 32a. The Plan grants the Plan Administrator discretionary authority to "[c]onstrue the Plan" and "to take such action as may be necessary to correct [any] defect, rectify [any] omission or reconcile [any] inconsistency" in the Plan. *Id.* at 33a.

The Plan is a floor-offset arrangement that includes both a defined contribution component and a defined benefit component. The defined contribution component provides each participant with an account in a profit sharing plan funded by Xerox. These accounts were known as Retirement Accounts until 1989; as part of a 1989 Plan Restatement, they were renamed Transitional Retirement Accounts ("TRAs"). *See* Pet. App. 83a-84a.[1]

The defined benefit component of the Plan provides participants with a floor benefit in the form of a retirement annuity equal to the larger of the annuities provided by two defined benefit formulas. Pet. App. 25a. One of these two formulas, the Highest Average Pay (or "HAP") formula, provides a monthly retirement annuity based on a participant's five highest years of salary and his or her years of service to Xerox. *Id.*[2]

As required by Revenue Ruling 76-259, the Plan identifies the actuarial basis used to offset the account balance provided by the defined contribution

---

[1] Under the 1989 Plan Restatement, a participant's Retirement Account was converted into a Transitional Retirement Account effective January 1, 1990. Pet. App. 26a-27a; J.A. 33; *see also* 83a-86a (Plan references to prior distributions from TRAs apply to prior distributions from Retirement Accounts).

[2] The other defined benefit formula, known as the "CBRA" formula, is a "cash balance" formula. The CBRA formula provides a retirement annuity that is the actuarial equivalent of the balance in a hypothetical account maintained on behalf of each participant. Pet. App. 26a.

component of the Plan in determining the floor benefit provided by the defined benefit component. For these purposes, a participant's account balance is converted into an annuity "using annuity rates established by the [Pension Benefit Guaranty Corporation ("PBGC")]." J.A. 31a (Plan Section 4.3(e)). If the annuity attributable to the account balance equals or exceeds the guaranteed floor benefit, the participant's retirement benefit will consist solely of the balance in his or her defined contribution account. If, however, the annuity attributable to the account balance is *less* than the floor benefit, the participant will receive, in addition to his or her account balance, a top-up benefit from the defined benefit component of the Plan. The combination of the defined contribution account balance and the top-up benefit (if any) provides the total benefit to which the participant is entitled. *See Miller* v. *Xerox Corp. Ret. Income Guar. Plan*, 464 F.3d 871, 872-73 (9th Cir. 2006) (describing the operation of the Xerox Plan).

4. The Plan's Treatment of Rehired Employees. Respondents are current or former employees of Xerox who worked for Xerox for a period of time, left Xerox's employment, and later were rehired by Xerox. Pet. App. 25a. When their first period of employment with Xerox ended, Respondents received a retirement benefit consisting of a lump sum distribution of the balance in their defined contribution accounts. *Id.* at 84a.

Upon their rehire, Respondents' floor benefit under the HAP defined benefit formula was based on *all* of their service to Xerox, including service

rendered during their initial period of employment. Pet. App. 26a, 100a. If the Plan provided these employees with a floor benefit based on all of their service to the company, but failed to take account of the retirement benefits provided after their initial period of employment, the employees would receive double credit for their initial service to Xerox. *Id.* The Plan therefore reduces the floor benefit guaranteed to rehired employees to account for any retirement benefits they already have received. *Id.*

Two Plan provisions address this reduction: a "non-duplication of benefits" provision, and a provision requiring the use of a reconstructed account methodology (which the decisions below referred to as the "phantom account" methodology).

The non-duplication of benefits provision states that the pension benefit of an employee who has already received a distribution "shall be offset by the *accrued benefit attributable to such distribution*." J.A. 32a (Plan Section 9.6) (emphasis added). The Plan defines the term "accrued benefit" as a monthly annuity beginning at the employee's normal retirement date. *Id.* at 6a-7a. (Section 1.1), 29a-31a (Section 4.3). The non-duplication of benefits provision thus requires that the benefits payable to a rehired employee be offset by the monthly annuity "attributable to" the prior distribution received by the employee.

The reconstructed account methodology calculates the annuity attributable to a prior distribution in a particular way. Under this methodology, the prior distribution is brought forward to the present as if it

had remained invested in the participant's defined contribution account and had grown (or shrunk) in value based on the account's intervening investment experience. Pet. App. 71-72. This "reconstructed" present-day account balance is then converted into its annuity equivalent which, in turn, is credited toward the participant's minimum guaranteed benefit under the defined benefit component of the Plan.

The Plan Administrator has consistently applied the reconstructed account methodology since the early 1980s. Pet. App. 83a-85a; *see* J.A. 19a. Effective April 1990, the Plan language requiring this methodology provided as follows:

> Where a [participant] has received a distribution from his [TRA defined contribution account] prior to the relevant time, it shall be assumed that his actual [TRA] balance at the relevant time includes an amount equal to the sum so distributed as it would have increased or decreased during the period from the time of the distribution to the relevant time. . . .

Pet. App. 66a-67a.[3] Before 1990, the Plan included similar reconstructed account language pertaining to the accounts that were renamed TRA accounts in the

---

[3] The language added by the April 1990 amendment was inadvertently omitted from the definition of the TRA in the 1989 Restatement. *See* Pet. App. 84a.

1989 Plan Restatement. Pet. App. 83a-85a; *see* J.A. 33a.

5. *Frommert I.* Respondent Paul Frommert left Xerox in 1986 and received a lump sum distribution of his retirement benefits. Pet. App. 72a. In 1996, following his rehire by Xerox, he wrote to the Plan Administrator to question his projected retirement benefit, which had been reduced to take account of his prior distribution. *Id.* at 74a. The Plan Administrator treated this inquiry as a request for additional benefits, which it denied on the ground that Frommert's projected benefit had been correctly calculated under the reconstructed account methodology. *See id.*

In November 1999, Frommert and a number of other rehired employees filed the instant lawsuit, seeking relief from the reconstructed account methodology. Pet. App. 74a-75a. In July 2004, the district court upheld the Plan's use of the methodology and granted summary judgment for Petitioners. *Id.* at 98a. The district court reasoned that the Plan Administrator's "consistent application" of the methodology was neither arbitrary nor capricious "[g]iven the history of the Plan." *Id.* at 85a.

In January 2006, the Second Circuit issued a decision ("*Frommert I*") reversing the district court in part. The Second Circuit concluded that the reconstructed account methodology had not been adequately disclosed to participants – and therefore did not properly become a part of the Plan – until the distribution of the 1998 Summary Plan Description

("SPD"). Pet. App. 37a-40a, 51a.[4] In the court's view, "the 1998 SPD amended the text of the Plan" by validating the pre-existing Plan language relating to the reconstructed account methodology. *Id.* at 51a. On this basis, the court upheld application of the reconstructed account methodology to employees rehired after the 1998 SPD was issued, but prohibited its application to Respondents because they were rehired before 1998. *Id.* at 37a-40a; 51a.

The Second Circuit remanded to the district court for a determination of the benefits due to Respondents under the "pre-amendment" terms of the Plan, *i.e.*, the terms of the Plan as they existed before 1998. The court of appeals also determined that, on remand, "the necessary remedies can be fully provided under [29 U.S.C. § 1132](a)(1)(B)." Pet. App. 53a. The court explained that "[t]he relief that [Respondents] seek, recalculation of their benefits consistent with the terms of the Plan, falls comfortably within the scope of [§ 1132 (a)(1)(B)], which allows a plan participant to recover benefits due to him under the terms of his plan." Pet. App. 53a. Accordingly, the court of appeals dismissed Respondents' claim for equitable relief under 29 U.S.C. § 1132(a)(3). Pet. App. 53a-55a.

---

[4] Although the pre-1998 SPD disclosed the existence of an offset for prior distributions for rehired employees, *see* Pet. App. 68a, and although other communications to participants provided additional detail regarding the offset, *see id.* at 30a-31a; J.A. 60, the Second Circuit concluded that these disclosures were inadequate.

6. Proceedings On Remand. On remand, the parties agreed that, "to avoid duplication of benefits, some sort of offset against current benefits is necessary to reflect the employee's receipt of monies at the time of the prior separation from employment." Pet. App. 100a. The district court invited submissions from the parties on how this offset should be calculated.

Respondents argued on remand that a rehired employee's benefit should be offset only by the *nominal* value of a prior distribution, without any adjustment to account for the time value of money. An example illustrates this approach:

Respondent Alan Clair worked for Xerox from 1970 until 1985, at which time he left the company and received a lump sum distribution of approximately $63,000 from the Plan. J.A. 106a. Mr. Clair returned to Xerox in 1987 and continued to be employed there as of 2006. *Id.* at 107a. If Mr. Clair had retired in 2006, the Plan would have guaranteed him a floor benefit of about $5,000 per month for the remainder of his life, subject to an offset for his 1985 distribution. *See id.* at 109a-10a. This monthly annuity had a present value of approximately $880,000 in 2006. *Id.*

Under Respondents' "nominal offset" approach (sometimes referred to below as the "Jaffe" or "*Layaou*" approach), the $880,000 present value of Mr. Clair's floor benefit in 2006 would be reduced by only $63,000 – the nominal amount of the distribution Mr. Clair received in 1985. J.A. 109a-10a. No adjustment would be made to account for the

fact that a $63,000 payment made in 1985 is worth approximately twice as much as a $63,000 payment made in 2006. *Id.* Thus, under the nominal offset approach, if Mr. Clair had stayed with Xerox for his entire career rather than working elsewhere from 1985 to 1987, the real value of his retirement benefits would have been substantially *lower*. *Id.*

Expert actuaries retained by both sides testified about the nominal offset approach in the district court. Petitioners' actuary explained that, "by disregarding the time value of money," a nominal offset approach creates "a privileged class of employees who, as a result of reemployment, would receive greater benefits than otherwise similar employees who did not receive [prior] distributions." J.A. 110a. Respondents' actuary likewise testified that a nominal offset would not be "an equitable solution" because "there is some intrinsic time value of money" that a nominal offset ignores. *Id.* at 127a. Respondents' actuary also agreed that, "in fairness, to account for [the time value of money], you would have to do some actuarial equivalence of th[e] lump sum to account for its value . . . today." *Id.* at 130a.

The Plan Administrator offered a different interpretation of the "pre-amendment" Plan terms that accounts for the time value of money. In the Plan Administrator's view, in the absence of the reconstructed account methodology, a prior distribution to a rehired employee should be taken into account by (i) converting the distribution into an actuarially equivalent annuity using annuity rates established by the PBGC, and then (ii) offsetting that

annuity against the annuity floor benefit guaranteed by the HAP formula. Pet. App. 150a-153a.

The non-duplication of benefits provision in Section 9.6 of the Plan requires a rehired employee's "accrued benefit" under the HAP formula to be offset by the "accrued benefit attributable to" any prior distribution to the employee. Pet. App. 141a. As the Plan Administrator observed, such an offset requires the prior distribution to be converted into an annuity payable at age 65, because the HAP formula expresses a participant's accrued benefit as an age-65 annuity. *Id.* at 152a; *see also id.* at 149a. The Plan Administrator also observed that the Plan uses PBGC annuity rates (*i.e.*, the "Statutory Assumptions") to convert defined contribution account balances into annuities. *Id.* at 150a (citing Plan Section 4.3(e)); *see also id.* at 141a (Plan Section 4.3(e)).[5] The Plan Administrator thus concluded that a prior distribution should be "converted into an age 65 annuity *as of the time of the prior distribution*" using PBGC annuity rates and then offset against participant's HAP benefit. *Id.* at 152a-153a (¶¶ 17-19).

The Plan Administrator noted that the Treasury Department had endorsed this approach in its safe harbor regulation applicable to floor-offset arrangements. Pet. App. 148a-49a, 152a. Under the safe harbor, the "accrued benefit" otherwise payable to an employee under the defined benefit component

---

[5] Section 4.3(f) requires a similar calculation for converting a CBRA account into an annuity. Pet. App. 150a.

of the arrangement is reduced by the actuarial equivalent of any prior distributions from the defined contribution component. *Id.* at 148a (citing 26 C.F.R. § 1.401(a)(4)-8(d)(1)(i)). The Plan Administrator concluded that the Treasury Department's endorsement of this approach to calculating offsets demonstrates its reasonableness. Pet. App. 152a.

Petitioners argued that the district court should resolve the disagreement between the parties regarding the proper interpretation of the Plan on remand by deferring to the Plan Administrator.[6] Rather than deferring to the Plan Administrator, however, the district court resolved the disagreement "in favor of the employee[s]" by adopting Respondents' nominal offset approach. Pet. App. 107a.

7. *Frommert II.* The Second Circuit affirmed the district court's holding in pertinent part ("*Frommert II*"). The Second Circuit recognized that where, as here, a plan administrator is given "discretionary authority to 'construe the terms of the plan,'" the administrator's interpretation of plan language ordinarily is entitled to deference. Pet. App. 12a-13a. The Second Circuit also acknowledged that the Plan Administrator's interpretation had been thoroughly presented to the district court in "briefs and at oral argument, in a sworn affidavit from the plan administrator, and in a written report and

---

[6] *See* Defendants' Pre-Hearing Brief Addressed To Remedies, at 5-8; Defendants' Pre-Hearing Reply Brief Addressing Remedies, at 2, 4.

accompanying testimony from an independent actuary." *Id.* at 11a. In the Second Circuit's view, the Plan Administrator's interpretation had been presented to the district court so thoroughly that "nothing . . . might have been gained by the District Court's remanding the matter to the plan administrator." *Id.* at 11a.[7]

The Second Circuit nonetheless rejected Petitioners' argument that the Plan Administrator's interpretation of the "ambiguous non-duplication of benefits provision" is entitled to deference. Pet. App. 8a, 12a-13a. Instead, the Second Circuit dismissed the Plan Administrator's interpretation as a "mere *opinion*" to which no deference is due:

> [Petitioners] argue that the District Court erred in failing to adopt the plan administrator's proposed approach, or at least consider it under a deferential standard of review. . . . However, the District Court here *had no decision to review because the plan administrator never rendered any decision other than the original benefit determinations*, all of which were premised on the now-impermissible "[reconstructed] account" offset mechanism. *See* [*Nichols* v.

---

[7] The Second Circuit found that Petitioners waived any argument that the case should have been remanded to the Plan Administrator after *Frommert I*, but not the argument that the district court should have deferred to the proposed remedy that the Plan Administrator presented to the district court. Pet. App. 10a-11a.

> *Prudential Ins. Co. of Am.*, 406 F.3d 98, 108 (2d Cir. 2005)] ("[W]e may give deferential review only to actual exercises of discretion."). [Petitioners] have identified no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA.

Pet. App. 12a-13a (emphasis of "opinion" in original).

Having declined to defer to the Plan Administrator's interpretation, the Second Circuit held that the *district court's* interpretation was entitled to deference from the court of appeals. Pet. App. 8a. Rather than applying a *de novo* standard of review to the district court's determination of the "proper level of pension benefits" due under the terms of the Plan, the Second Circuit reviewed the district court's interpretation only "for an excess of allowable discretion." *Id.* at 8a; 13a.

The Second Circuit recognized that the district court's decision "apparently" fails to make "any . . . adjustment to reflect the inflation-adjusted values of the prior distributions." Pet. App. 9a. It nevertheless affirmed the district court's interpretation under a deferential standard of review, describing that interpretation as "one reasonable approach among several reasonable alternatives." *Id.* at 13a-14a.

SUMMARY OF ARGUMENT

1. a. When an ERISA plan gives the plan administrator "discretionary authority to determine eligibility for benefits or to construe the terms of the plan," courts apply a deferential standard of review to the plan administrator's determinations. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989). This deferential standard of review is not subject to "special procedural or evidentiary rules," and it applies even when the plan administrator is operating under a conflict of interest. *Metropolitan Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343, 2351 (2008).

Firestone deference furthers important objectives of ERISA. It allows employers to assign primary responsibility for interpreting ERISA plans to those with the best understanding of the plan and the greatest expertise in complying with the complex rules that govern ERISA plans. Deferential review also promotes uniformity of plan administration by reducing the potential for different courts to arrive at different interpretations of the same plan language. In addition, deferential review protects plans from unanticipated interpretations of plan terms that could result in large, unfunded plan liabilities.

b. The ERISA plan at issue in this case grants broad discretion to the Plan Administrator to interpret the terms of the Plan. After the court of appeals ruled that a particular Plan methodology was not properly included in the Plan, the Plan Administrator offered a considered interpretation of the remaining Plan terms. The court of appeals refused to defer to the Plan Administrator on the

ground that he had offered a "mere *opinion*" that was not part of the "original benefit determination[]." Pet. App. 13a.

The court of appeals' refusal to defer is contrary to *Firestone* and *Glenn*. Those decisions looked to the terms of the plan to determine the nature and scope of the discretion conferred on plan administrators. Here, the Plan grants the Plan Administrator broad discretion to construe the Plan as well as discretion to correct defects, rectify omissions, and reconcile inconsistencies in the Plan. Pet. App. 142a. *Firestone* and *Glenn* also looked to trust law, which does not confine a trustee's discretionary authority to interpret the terms of a trust to interpretations offered in the context of an "original benefit determination." The court of appeals' decision is also inconsistent with *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 568 (1985), which gave "significant weight" to an interpretation of the plan first offered by the plan trustee in litigation.

Because plan administrators are called upon to interpret ERISA plans in numerous contexts, the court of appeals' approach creates a far-reaching exception to *Firestone* deference. There is no persuasive justification for such an exception. To the contrary, the court of appeals did what this Court prohibited in *Glenn*: it invented an arbitrary test for stripping away *Firestone* deference that is not supported by the terms of the Plan, the law of trusts, or this Court's decisions.

c. In its first decision in this case, the court of appeals held that the Plan Administrator had erred by computing benefits in accordance with a Plan methodology that had not been adequately disclosed. That error did not justify stripping the Plan Administrator of discretion to construe the remaining terms of the Plan on remand. Trust law distinguishes between a trustee's good-faith, but erroneous, exercise of discretion, and bad-faith, fraudulent or dishonest conduct. As this Court observed more than a century ago, where "there is no *mala fides*, . . . the court will not take upon itself" to exercise "the discretion of trustees." *Colton* v. *Colton*, 127 U.S. 300, 320-21 (1888).

There was no *mala fides* in this case. The Plan Administrator applied the same methodology consistently throughout the history of the Plan. The district court initially upheld the use of the methodology, and the Second Circuit held that it was permissible once it was properly disclosed. As a result, there was no basis for concluding that the Plan Administrator would not be capable of exercising his discretion fairly and honestly going forward.

A hair-trigger rule that strips plan administrators of discretionary authority based on run-of-the-mill mistakes would undermine important purposes of ERISA. It would thrust courts into the role of administering pension plans with alarming frequency and increase the prospect of inconsistent interpretations and unanticipated liabilities. Employers faced with such risks would be more reluctant to sponsor employee benefit plans. For

these reasons, several courts of appeals have correctly held that a denial of benefits, even if arbitrary and capricious, does not strip the plan administrator of the discretion conferred by the plan. A different rule would "encourage the dumping of difficult and discretionary decisions into the laps of courts." *Vizcaino* v. *Microsoft Corp.*, 120 F.3d 1006, 1013-14 (9th Cir. 1997) (en banc).

d. The government incorrectly suggests that deference should be denied because the Plan Administrator merely offered a different interpretation of the "same" Plan terms on remand from *Frommert I*. The Plan Administrator did not interpret the "same" Plan terms; he interpreted the *remaining* Plan terms, after setting aside the terms that the court of appeals held were not properly included in the Plan. Moreover, there is no basis in ERISA or trust law for drawing a distinction between good-faith mistakes that involve the "same" terms of the plan and other good-faith mistakes.

The government's suggestion that deference should be denied because the Plan is "silent" regarding the offset for prior distributions is also incorrect. The Plan includes a non-duplication of benefits provision stating that the pension benefits of rehired employees must be offset "by the accrued benefit attributable to [prior] distribution[s]." Pet. App. 141a. "Accrued benefit" is a defined term under the Plan, and the definition cross-references another Plan provision that calls for the use of PBGC annuity rates to convert a participant's account balance into an "accrued benefit."

2. a. Having erroneously refused to defer to the Plan Administrator's interpretation of the Plan, the court of appeals committed a second error by deferring to the *district court's* interpretation. The court of appeals instructed the district court on remand to determine the benefits due under "the pre-amendment terms of the Plan describ[ing] how prior distributions were to be treated." Pet. App. 51a. The court of appeals reviewed the district court's interpretation of these pre-amendment Plan terms only for "an excess of allowable discretion," *id.* at 11a, and upheld the district court's interpretation as "one reasonable approach among several reasonable alternatives," *id.* at 13a-14a.

The court of appeals should have reviewed the district court's decision under a *de novo* standard. District court interpretations of written documents generally are reviewed *de novo*. So too are claims for benefits due under the terms of an ERISA plan (absent a grant of discretionary authority to the plan administrator). *See Firestone*, 489 U.S. at 115. The fact that the district court was charged with fashioning a remedy for an ERISA violation does not change the applicable standard of review. District courts do not have discretion to make errors of law, and thus a *de novo* standard of review applies to the district court's determination of the benefits due under the terms of the Plan.

The Second Circuit's application of deference to the district court's interpretation undermines ERISA's goal of uniform plan interpretation by exposing ERISA plans to the prospect that different district courts may adopt different or even

inconsistent interpretations of the same ERISA plan, and that courts of appeals will be required to affirm such divergent interpretations as long as each of them falls within the range of a district court's "allowable discretion."

b. Under a *de novo* standard of review, the district court's interpretation should be rejected. That interpretation ignores the time value of money – the fundamental economic principle that a sum of money today is worth more than the same sum of money many years from now. By ignoring this principle, the district court conferred a windfall on participants who left Xerox and later were rehired, providing them with benefits worth significantly more than those provided to otherwise-equivalent participants whose service to Xerox was uninterrupted. The district court's interpretation also fails to take account of Plan terms (i) specifying that the benefit provided to a rehired employee "shall be offset by the accrued benefit attributable to such distribution," (ii) defining "accrued benefit" as an annuity payable at age 65, and (iii) directing the use of "annuity rates established by the PBGC" to calculate such an annuity. Pet. App. 134a, 141a, 148a, 150a.

The Plan Administrator's interpretation, in contrast, takes account of these Plan terms, appropriately accounts for the time value of money, avoids conferring windfalls on rehired employees, and conforms to IRS guidance designed to maintain the integrity of floor-offset plans. The Plan Administrator's interpretation is therefore superior to the district court's interpretation.

ARGUMENT

I. A PLAN ADMINISTRATOR'S EXERCISE OF DISCRETIONARY POWERS CONFERRED BY AN ERISA PLAN IS SUBJECT TO A DEFERENTIAL STANDARD OF REVIEW.

A. This Court's Decisions Apply A Deferential Standard of Review To Discretionary Interpretations By A Plan Administrator.

In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), this Court held that "a denial of benefits challenged under [29 U.S.C.] § 1132(a)(1)(B)" is subject to a deferential standard of review if "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115. The Court drew on principles of trust law, which "make a deferential standard of review appropriate when a trustee exercises discretionary powers." *Id.* at 111. Applying these principles, the Court concluded that "[a] trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable." *Id.*

In *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008), the Court reaffirmed *Firestone*'s adoption of a deferential standard of review under § 1132(a)(1)(B). *Glenn* elucidated the Court's statement in *Firestone* that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict

must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Firestone*, 489 U.S. at 115 (quoting Restatement (Second) of Trusts § 187, cmt. *d* (1957)). The Court concluded that a conflict of interest exists where an employer "both funds the plan and evaluates the claims." 128 S. Ct. at 2348. The Court rejected the idea, however, that such a conflict results in "a change in the *standard* of review, say, from deferential to *de novo*." *Id.* at 2350. The Court was unwilling to "overturn *Firestone* by adopting a rule that in practice could bring near universal review by judges *de novo* – *i.e.*, without deference – of the lion's share of ERISA plan claims denials." *Id.* The Court also observed that "[t]rust law continues to apply a deferential standard of review to the discretionary decisionmaking of a conflicted trustee." *Id.* (citation omitted).

The Court expressly declined "to create special burden-of-proof rules, or other special procedural or evidentiary rules" to strip away deference. *Id.* at 2351. Instead it directed courts to proceed by "taking account of several different, often case-specific, factors, reaching a result by weighing all together." *Id.* (citations omitted). The Court observed that a conflict of interest "should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision," and "should prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy." *Id.*

Firestone and *Glenn* thus affirm that courts apply a deferential standard of review to the discretionary

determinations of ERISA plan administrators. *See also Cent. States, Se. & Sw. Areas Pension Fund* v. *Cent. Transp., Inc.*, 472 U.S. 559, 568 (1985) (according "significant weight" to an ERISA trustee's interpretation of a plan in a case in which "the trust agreement explicitly provide[d] that 'any construction [of the agreement's provisions] adopted by the Trustees in good faith shall be binding").

B. A Deferential Standard Of Review Furthers Important Objectives Of ERISA.

Deferential review of a plan administrator's discretionary determinations serves important objectives of ERISA. In enacting ERISA, Congress sought to "promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits." H.R. Rep. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4640. To achieve that goal, Congress did not "mandate what kind of benefits employers must provide if they choose to have [a retirement] plan." *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996). Instead, Congress allowed employers to make those choices. *See* H.R. Rep. No. 93-533, 1974 U.S.C.C.A.N. at 4647 ("flexibility in the design and operation of . . . pension programs" is "vital" to the willingness of employers to provide such plans).

Firestone deference promotes the goal of increased availability of private pension benefits in several ways. First, *Firestone* deference allows employers to assign primary responsibility for

interpreting ERISA plans to "those whose experience [with such plans] is daily and continual, not with judges whose exposure is episodic and occasional." *Berry* v. *Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1985). The text of ERISA requires every plan to have "one or more named fiduciaries" with "authority to control and manage the operation and administration of the plan" and allows an employer to appoint an officer, employee or agent of the employer to serve as a fiduciary. 29 U.S.C. §§ 1102(a)(1) & 1108(c)(3).[8] Only a named fiduciary is empowered to resolve benefit appeals. *Id.* § 1133(2).

When the plan documents authorize a plan administrator who is a named fiduciary to interpret the plan in his or her discretion, deferential review of the exercise of this discretion allows the plan to take advantage of

---

[8] Congress deliberately allowed plan fiduciaries to resolve benefit payment disputes and chose not to mandate resolution by an outside party. Early versions of the Senate bill gave this responsibility to the Department of Labor; later versions gave it to an arbitrator. *See* S. 1179, 93d Cong. § 602 (1973), *reprinted in* I Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. Legislative History ("Leg. Hist.") 780, 988-90 (Dep't of Labor); S. Rep. No. 93-383, at 116-117 (1973), *reprinted in* I Leg. Hist. 1063, 1184-1186 (same); H.R. 2, 93d Cong. § 691 (1974), 120 Cong. Rec. 5001 (1973), *reprinted in* III Leg. Hist. 3599, 3813-3814 (arbitrator). The Senate arbitration provisions were rejected by the ERISA conference committee, however, on the ground that they could be too costly to plans and stimulate frivolous disputes. 120 Cong. Rec. 29,941 (1974), *reprinted in* III Leg. Hist. at 4769 (Sen. Javits).

> the plan administrator's greater experience and familiarity with plan terms and provisions; the enhanced prospects of achieving consistent application of those terms and provisions that results; the desire of those who establish ERISA plans to preserve at least some role in their administration; and the importance of ensuring that funds which are not unlimited go to those who, according to the terms of the plan, are truly deserving.

Evans v. *Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 323 (4th Cir. 2008). In addition, because ERISA plans are subject to numerous and often highly technical requirements, plan administrators are in the best position to interpret a plan in a manner that satisfies the many rules imposed on these plans.

Second, *Firestone* deference promotes uniformity of plan interpretation and administration. *See Raymond B. Yates, M.D., P.C. Profit Sharing Plan* v. *Hendon*, 541 U.S. 1, 17 (2004) ("ERISA's goal . . . is uniform national treatment of pension benefits." (citations and quotation marks omitted)). ERISA imposes a fiduciary duty on plan administrators to act "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). As this Court recently observed, this statutory duty "lets employers establish a uniform administrative scheme, with a set of standard procedures to guide processing of claims and

disbursement of benefits." *Kennedy* v. *Plan Adm'r for DuPont Sav. and Inv. Plan*, 129 S. Ct. 865, 875 (2009) (internal quotation marks and brackets omitted). A deferential standard of review reduces the risk that different courts will interpret plan documents in contradictory ways, thereby imposing irreconcilable fiduciary obligations on plan administrators. *See generally Moench* v. *Robertson*, 62 F.3d 553 (3d Cir. 1995) (holding that the courts must defer to a fiduciary's reasonable plan interpretation in a case alleging breach of fiduciary duty).

Third, *Firestone* deference protects plans from unanticipated interpretations of plan terms that may result in large unfunded liabilities. It is important that ERISA plans have "predictable financial consequences, both for the employer who pays the bill and for the employee who gets the benefit." *AT&T Corp.* v. *Hulteen*, 129 S. Ct. 1962, 1973 (2009); *accord Glenn*, 128 S. Ct. at 2354 (Roberts, C.J., concurring in part and concurring in the judgment) (noting that "certainty and predictability are important criteria under ERISA"). This is in part because, as Congress recognized, employers will be reluctant to sponsor ERISA plans if they are forced to pay higher levels of benefits than they intended to provide. H.R. Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682. *Firestone* deference provides an important safeguard against unanticipated interpretations of plan language that

could subject plan sponsors to potentially enormous liabilities.[9]

For each of these reasons, *Firestone* deference fosters the purposes and goals of ERISA.

C. *Firestone* Deference Is Not Restricted To Formal "Decisions" On Benefits Claims.

The Second Circuit's decision carves out a broad exception to *Firestone*'s rule of deference to the discretionary determinations of plan administrators. In the Second Circuit's view, such deference extends only to formal "decisions" made by a plan administrator, such as decisions made on "original benefit determinations." Pet. App. 13a. The court thus dismissed the Plan Administrator's interpretation of the pre-amendment Plan terms on remand as a "mere *opinion*" not deserving of deference. *Id.* The distinction drawn by the Second Circuit between a formal "decision" on a benefit claim and a mere "opinion" offered outside the context of an original claims determination has no basis in ERISA, this Court's decisions, or the law of trusts.

Whether deference is due to a plan administrator depends in the first instance on the discretion conferred on the administrator by the terms of the

---

[9] *See, e.g.*, *Young* v. *Verizon's Bell Atl. Cash Balance Plan*, 575 F. Supp. 2d 892, 909, 912 (N.D. Ill. 2008) ("hundreds of millions of dollars"); *Thomas* v. *SmithKline Beecham Corp.*, 297 F. Supp. 2d 773, 793 (E.D. Pa. 2003) ("millions of dollars"); *Adams* v. *Thiokol Corp.*, 231 F.3d 837, 843 (11th Cir. 2000) (same).

plan documents. *See Firestone,* 489 U.S. at 111 ("Whether 'the exercise of a power is permissive or mandatory depends upon the terms of the trust.'" (quoting 3 W. Fratcher, Scott on Trusts § 187, at 14 (4th ed. 1988))). Here, nothing in the text of the Plan limits the Plan Administrator's interpretive authority to a particular context such as an original benefits determination. To the contrary, the text of the Plan grants the Plan Administrator broad authority to "[c]onstrue the Plan" and "empower[s]" the Plan Administrator "to take such action as may be necessary to correct [any] defect, rectify [any] omission or reconcile [any] inconsistency" in the Plan. Pet. App. 142a.

Nor does trust law limit a trustee's discretionary authority to decisions made in the course of an "original benefit determination." Indeed, under the law of trusts, there is no analogue to the administrative claims process in which ERISA benefits are originally determined. If a trust beneficiary disagrees with the trustee's interpretation of the trust instrument, the beneficiary must challenge that interpretation in court, where the trustee's reasonable interpretation will receive deference. *See generally Firestone*, 489 U.S. at 110-11. Thus, the Second Circuit's distinction between the formal "decisions" and the mere "opinions" of a plan administrator is inconsistent with the law of trusts.

The Second Circuit's decision also conflicts with this Court's decision in *Central States*, which deferred to a trustee's interpretation of a pension plan outside the context of a benefit claims

proceeding. In *Central States*, the trustees of a multiemployer pension plan governed by ERISA brought a lawsuit seeking to compel participating employers to permit the trustees to conduct an audit. *See* 472 U.S. at 568. The trustees contended that a provision of the trust agreement granted them the authority to conduct the audit. Pointing to a provision of the trust document that authorized the trustees to provide binding interpretations of the plan, the Court accorded the trustees' interpretation "significant weight." *Id.* The Court accorded this deference to the trustees' interpretation even though it was offered for the first time in litigation. *See id.* at 563-64. *Central States* thus forecloses any argument that deference to a plan administrator's interpretation is unwarranted when offered outside the narrow confines of an original benefit determination.

The Second Circuit's approach would create a far-reaching exception to *Firestone* deference. As this Court recognized in *Glenn*, plan administrators are called upon to interpret ERISA plans in "many contexts," 128 S. Ct. at 2351, including numerous contexts far removed from administrative claims for benefits. For example:

- Plan administrators often interpret plan provisions for the first time in lawsuits seeking additional benefits under 29 U.S.C. § 1132(a)(1)(B). *See, e.g.*, *Pakovich* v. *Broadspire Servs., Inc.*, 535 F.3d 601, 606 (7th Cir. 2008) (observing that a court must seek the views of the plan administrator if an interpretive issue "did not ripen into an 'apple' ready to be bitten" until

after an initial court ruling); *Gallo* v. *Amoco Corp.*, 102 F.3d 918, 923 (7th Cir. 1996) (observing that if, during litigation, a plan administrator's interpretation of a plan term requires additional explanation, a court must seek that explanation from the administrator and may not substitute its own interpretation).

- Plan administrators frequently offer plan interpretations in lawsuits seeking to enforce a plan's reimbursement and subrogation provisions. *See, e.g.*, *Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1122-23 (10th Cir. 2004) (according *Firestone* deference to plan administrator's interpretation of plan's subrogation provision).

- Plan administrators also offer plan interpretations in the course of lawsuits alleging that they breached their fiduciary duties by failing to follow the terms of the plan. *See, e.g.*, *Worthy* v. *New Orleans S.S. Ass'n/Int'l Longshoremen's Ass'n, ALF-CIO Pension Plan*, 342 F.3d 422, 427-28 (5th Cir. 2003) (deferring to ERISA trustee administrators' interpretation of trust language in a suit alleging that trust administrators violated their fiduciary duties).[10]

---

[10] Plan administrators are called upon to interpret plan terms in the course of exercising fiduciary duties in myriad contexts, including selecting an insurance underwriter for the plan, *see McDonald* v. *Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995); determining the composition of a board of trustees, *see Worthy*, 342 F.3d at 426-27; determining the proper valuation date for employer stock, *see Izzarelli* v. *Rexene Prods. Co.*, 24 F.3d 1506, 1521-22 (5th Cir. 1994); determining

In such cases, a rule withdrawing *Firestone* deference would subject plan fiduciaries to personal liability in the event that a court disagrees with their reasonable interpretation of the plan, *see* 29 U.S.C. § 1109, and could create conflicting fiduciary obligations should two different courts interpret ambiguous plan language differently.

There is no valid reason to deny *Firestone* deference to a plan administrator's discretionary determinations in any of these contexts. Where the terms of the plan confer discretion on the plan administrator, this Court's prior decisions, as well as principles of trust law, support a deferential standard of review regardless of the forum in which the administrator exercises his or her discretion.

D. A Conflict Of Interest Does Not Change The Standard Of Review.

Glenn holds that a conflict of interest is not a sufficient reason to reject *Firestone*'s deferential standard of review. Thus, the fact that the Plan Administrator's interpretation was offered in the context of litigation is not a sufficient reason to deny *Firestone* deference.

---

the identity of a beneficiary, *see Kmatz* v. *Metro. Life Ins. Co.*, 232 Fed. Appx. 451, 455 (6th Cir. 2007); determining when and how it is appropriate to suspend benefits, *see Hunter* v. *Caliber Sys., Inc.*, 220 F. 3d 702, 712 (6th Cir. 2000); and determining whether plan terms require investment of plan assets exclusively in employer stock, *see Moench*, 62 F.3d at 556, 565-66.

Prior to *Glenn*, courts of appeals devised a variety of tests for determining when a conflict of interest required a court to deny *Firestone* deference to a plan administrator's interpretation of an ERISA plan. *Glenn* rejected these tests as unjustified departures from *Firestone*. *See Glenn*, 128 S. Ct. at 2350. The Court concluded that it was neither "necessary [n]or desirable for courts to create . . . special procedural or evidentiary rules," because such rules would only "create further complexity." *Id.* at 2351. Observing that "[b]enefits decisions arise in too many contexts" and "concern too many circumstances" to justify a "special procedural rule[]" for conflicted administrators, the Court held that a conflict of interest does not support a change in the standard of review "from deferential to *de novo*," but instead is simply a "factor" that courts should consider in determining whether a plan administrator has abused its *Firestone* discretion. *Id.* at 2350-51.

Here, the court of appeals did exactly what this Court prohibited in *Glenn*: it invented an arbitrary test for stripping away *Firestone* deference that had no basis in the terms of the Plan or the law of trusts. Given *Glenn*'s holding that a conflict of interest is merely a "factor" to consider in determining whether a plan administrator has abused its *Firestone* discretion, it follows that the particular forum in which the Plan Administrator offers his interpretation of the plan is at most a factor to

consider, and not a basis for denying deference altogether.[11]

E. Absent A Finding Of Bad Faith, A Mistake Does Not Strip The Plan Administrator Of Discretionary Authority Conferred By The Plan.

As explained above, the Plan Administrator initially construed the Plan to require the use of a reconstructed account methodology that had been applied consistently throughout the history of the Plan. The Second Circuit, however, subsequently held that this methodology was not properly included in the Plan until 1998. The Plan Administrator's good faith mistake in applying an inadequately disclosed methodology does not justify stripping the Plan Administrator of the discretionary authority to interpret the remaining Plan terms. To the contrary, principles of trust law and the purposes of ERISA both support the conclusion that the Plan Administrator's interpretation of the remaining Plan terms is entitled to *Firestone* deference.

---

[11] In *Glenn*, the plan administrator adopted "seemingly inconsistent positions [that] were both financially advantageous," emphasized a single favorable medical report while deemphasizing unfavorable reports, and failed to provide its independent experts with all of the relevant evidence. 128 S. Ct. at 2352. Here, in contrast, the Plan Administrator's interpretation is supported by the Plan language, fundamental economic principles, and tax law. *See* Part II.B, *infra*.

1. Absent Bad Faith Or Similar Misconduct, Trust Law Does Not Strip A Trustee Of Discretion Based Upon A Mistake.

Trust law distinguishes between a trustee's good-faith but erroneous exercise of discretion and more troubling conduct, such as fraud, bad faith, or dishonesty. *See, e.g.*, 3 W. Fratcher, Scott on Trusts § 187.1, at 27-31 (4th ed. 1988). Where a trustee has abused his discretion by failing to pay a proper amount to the beneficiary "due to a mistake as to [the trustee's] duties or powers" and "there is no reason to believe that [the trustee] will not fairly exercise the discretion conferred upon him after the court has determined the extent of his duties and powers," a court will "direct the trustee to pay a reasonable amount." *Id.* § 187.1, at 30. Only "[w]here the trustee's failure to pay a reasonable amount was due to a failure to exercise his discretion honestly and fairly" may the court "itself fix the amount." *Id.* § 187.1, at 28.[12]

As the Scott treatise observes, this Court recognized that principle more than a century ago in *Colton* v. *Colton*, 127 U.S. 300 (1888). *Colton* states

---

[12] The most recent edition of the Scott treatise states the same principle, although the discussion is more abbreviated. 3 W. Fratcher & M. Ascher, Scott and Ascher on Trusts § 18.2.1, at 1348-49 (5th ed. 2007) (where trustee's failure to pay a reasonable amount "is due to a mistake" rather than "a failure to exercise the discretion honestly and fairly," "the court ordinarily will not fix the amount but will instead direct the trustee to make reasonable provision").

that "where the manner of executing a trust is left to the discretion of trustees, and they are willing to act, and there is no *mala fides*, the court will not ordinarily control their discretion as to the way in which they exercise the power." *Id.* at 320-21. In contrast, "the court will interfere whenever the exercise of the discretion by the trustees is infected with fraud or misbehavior, or they decline to undertake the duty of exercising the discretion, or generally where the discretion is mischievously and erroneously exercised." *Id.* at 321; *see also* Scott on Trusts § 187.1, at 29 (discussing *Colton*); *cf. Cent. States*, 472 U.S. at 568 (giving trustees' interpretation "significant weight" in the absence of "bad-faith motive").

Similarly, in *Eaton* v. *Eaton*, 132 A. 10 (N.H. 1926), a trustee "refused to make any payments for [the beneficiary's] support" based on an erroneous construction of the trust instrument. *Id.* at 11. The New Hampshire Supreme Court held that it was error for the trial court to determine the amount that should be paid to the beneficiary of the trust:

> The question was whether the trustee had acted reasonably. If it was found he had not, the appropriate order was to require him to do so. *His failure to administer the fund properly did not entitle the court to act as a substitute trustee.*

Id. (emphasis added). The court noted that, "in passing on the reasonableness of the trustee's action," the trial court "may find the least amount

that a reasonable judgment would allow," and "may also find the most that would be thus allowed." *Id.* But "*within the limits of reasonableness the trustee may alone exercise discretion, since that is what the will requires.*" *Id.* (emphasis added); *see also* Scott on Trusts § 187.1, at 30-31 (discussing *Eaton*); *Hanford* v. *Clancy*, 183 A. 271, 272-73 (N.H. 1936) (holding that if the trustee acts unreasonably, "the court should take appropriate action to curb the trustee, but he may not exercise discretion for him"; "[i]f more than one reasonable disposition could be made, then the trustee must make the choice").

Citing *Eaton*, the Nebraska Supreme Court held that the trustee had erred by refusing to provide support and maintenance to the wife and child of the named beneficiary. *In re Sullivan's Will*, 12 N.W.2d 148 (Neb. 1943). The court held that, despite the trustee's mistake, the trial court "was without authority to determine the amount of support to which plaintiff was entitled from the trust fund." *Id.* at 151. The court explained that "[t]he settlor of the trust prescribed that this was to be a duty of the trustees, and clearly the court has no authority to substitute its judgment for that of the trustees." *Id.* Although the court can "compel the trustees to carry out the terms of the trust," it "cannot act for the trustee or do anything other than prescribe the minimum or maximum limits within which the trustees must act and compel such action within such limits." *Id.*

In *Manning* v. *Sheehan*, 133 N.Y.S. 1006 (N.Y. Sup. Ct. 1911), the trustee "failed to make suitable provision" for the beneficiary due to his mistaken

doubt as to "his legal right to make payments out of the principal." *Id.* at 1008-09. The court held that its power "to compel the trustee to exercise in a reasonable manner the discretion vested in him by the will . . . does not substitute the judgment of the court for the judgment of the trustee when honestly exercised." *Id.* at 1008. Only "[i]f there is a culpable failure to exercise that discretion in a reasonable manner" may "the court give specific directions as to the amounts to be paid." *Id.* (citations omitted). Because the trustee "ha[d] not been acting in bad faith," the court directed the trustee to pay an amount sufficient to "afford the [beneficiary] a reasonable support and maintenance," but did not fix the amount. *Id.* at 1009; *see also* Scott on Trusts § 187.1, at 31 (discussing *Manning*).

Other cases recognize and apply these principles. *See In re Brown*, 29 A.2d 52, 54-55 (Pa. 1942) (rejecting "the meaning ascribed to [the instrument] by the trustees," but holding that on remand "the amount to be allowed" must "be submitted to the trustees for the proper exercise of their judgment"); *In re Estate of Marre*, 114 P.2d 586, 590-91 (Cal. 1941) (holding that it was improper for a judge to "specify the exact amount of the payments to be made to the beneficiary" on remand, since the trust instrument gave the trustees "discretion" to determine that amount); *Old Colony Trust Co.* v. *Rodd*, 254 N.E.2d 886 (Mass. 1970) (declining to set the amounts to be paid after a trustee had made unreasonably low payments to a beneficiary); *Finch* v. *Wachovia Bank & Trust Co., N.A.*, 577 S.E.2d 306, 309-10 (N.C. Ct. App. 2003) (trustee that abused its discretion by failing to consider gift requests retained

discretion to act on those requests); *see also Collister* v. *Fassitt*, 57 N.E. 490, 493-94 (N.Y. 1900) (where trustee "failed to honestly and fairly exercise the discretion vested in her, it was competent for a court in equity to ascertain the amount and decree its payment"); *Elward* v. *Elward*, 232 P. 240, 240-41 (Kan. 1925) (where the trustee's provision for the beneficiary "so inadequate as to show bad faith or its equivalent," court may order trustee to pay a specific amount each month).[13]

The Restatement (Second) of Trusts reflects this case law. Section 187 states: "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." Restatement (Second) of Trusts § 187. As the comments and illustrations to Section 187 demonstrate, in the absence of "dishonesty" or "improper motive," *see id.* § 187 cmts. *f* & *g*, "control by the court" consists of directing the trustee to exercise discretion in a reasonable manner, rather than exercising discretion on the trustee's behalf, *see id.* § 187 cmt. *h*. For example, if

---

[13] In a pension case decided before Congress enacted ERISA, the D.C. Circuit, sitting *en banc*, concluded that the pension plan trustees' determination concerning eligibility requirements was unreasonable, but nevertheless held that "the Trustees are to be accorded the opportunity to fashion valid eligibility standards" and that the district court had erred in failing to defer to the reasonable eligibility standard adopted by the trustees during the course of the litigation. *Pete* v. *United Mine Workers of Am. Welfare & Ret. Fund of 1950*, 517 F.2d 1275, 1281-83 (D.C. Cir. 1975) (en banc).

a trustee with discretion to make an appropriate payment to a beneficiary withholds payment "because of a mistaken view as to the extent of his powers or duties," the court should respond by "order[ing] [the trustee] to pay *a reasonable amount* to [the beneficiary]." *Id.* § 187 cmt. *h* & illus. 8 (emphasis added); *see also id.* § 187 cmt. *h*, illus. 7. In such cases, the court "controls the exercise of a power by the trustee," *id.* § 187 cmt. *b*, not by itself making the trustee's discretionary determination, but instead by requiring the trustee to select from the range of reasonable options under the correct interpretation of the trust instrument.[14] While a court may enjoin the trustee from abusing his discretion by making *unreasonably* high or low payments, it will not prevent the trustee from selecting among the permissible options. *See id.* § 187 cmt. *i*, illus. 11 ("court may order [payment of] $150 a month" where "evidence shows that $150 a month is the *minimum* amount reasonably necessary for [the beneficiary's] support" (emphasis added)); *id.* § 187 cmt. *i*, illus. 12 (court may enjoin trustee from paying "more than $4000" where "under the circumstances $4000 is the *maximum* amount which can reasonably be considered necessary for [the beneficiary's] support" (emphasis added)). In

---

[14] The Reporter's Notes to Section 50 of the Restatement (Third) of Trusts cite the California Supreme Court's decision in *Estate of Marre* (cited above) and state: "[A]lthough courts can correct trustees for mistakes of law or construction by compelling exercise in the manner intended, it was improper for the lower court to go beyond this by instructing the trustee concerning the amounts to be paid." Restatement (Third) of Trusts § 50, Reporter's Notes at 282 (2003).

contrast, where the trustee acts "dishonestly, or from some improper motive," the court will interpose its own judgment even if there is "no standard indicated by the terms of the trust by which the reasonableness of [the trustee's] conduct" can be judged. *Id.* § 187 cmt. *i.*

Petitioners recognize that, at times, courts have determined the specific amount to be paid to a beneficiary without an express finding that the trustee acted in bad faith. But these cases generally contain little in the way of reasoning, do not expressly reject cases such as *Eaton*, and may not be inconsistent with those cases.[15] Thus, the weight of authority and the better-reasoned authority holds that, "within the limits of reasonableness," and

---

[15] *See, e.g., In re Estate of Manahan*, 125 N.W.2d 135, 137 (Iowa 1963) (where a trustee "failed to exercise but without inquiry rejected and resisted" claim, court was justified in deciding it); *Woodward* v. *Dain*, 85 A. 660 (Me. 1913) (ordering a payment of "not less than $20 a month, which sum is adjudged to be actually necessary for" beneficiary's support); *Schofield* v. *Commerce Trust Co.*, 319 S.W.2d 275 (Mo. 1958); *Emmert* v. *Old Nat'l Bank of Martinsburg*, 246 S.E.2d 236, 244-45 (W. Va. 1978) (remanding for a hearing to determine the frequency and amount of payments, and expressing the "hope" that in the event the beneficiary's needs change, "the trustee will voluntarily exercise its discretion to increase the distributions"); *In re Hafemann's Will*, 62 N.W.2d 561, 564 (Wis. 1954) (citing G. Bogert & G. Bogert, The Law of Trusts and Trustees § 560). The Bogert treatise includes a general statement that "[s]ometimes the court decides for the trustee how he should act," but also recognizes that a "court may order a new decision to be made in the light of rules expounded by the court, rather than instruct him as to the specific action which he should take." Bogert § 560, at 222 (2d ed. rev. 1980).

absent bad faith or dishonesty, "the trustee alone may exercise discretion, [where] that is what the [trust instrument] requires." Scott on Trusts § 187.1, at 30-31 (quoting *Eaton*, 132 A. at 11).

Here, the district court should not have "take[n it] upon itself" to exercise "the discretion of trustees." *Colton*, 127 U.S. at 320-21. The court of appeals recognized that the district court's interpretation of the pre-1998 Plan was but one "among *several* reasonable alternatives," Pet. App. 13a-14a (emphasis added), and did *not* hold that the interpretation offered by the Plan Administrator was *un*reasonable. Nor was there any finding that the Plan Administrator acted in bad faith in applying the reconstructed account methodology.[16] Accordingly, the courts below should have deferred to the Plan Administrator's reasonable interpretation of the pre-amendment Plan terms.

---

[16] Nor could such a finding have been made here. The reconstructed account formula had been applied consistently throughout the history of the Plan. The district court initially agreed that the methodology could lawfully be applied to Respondents, and the Second Circuit agreed that it could be applied after it was adequately disclosed to plan participants. Pet. App. 51a, 85a. Under these circumstances, the Plan Administrator's mistake in applying the reconstructed account methodology to Respondents did not justify stripping the Plan Administrator of discretion to interpret the Plan in the absence of the reconstructed account provision.

2. Stripping A Plan Administrator's Discretion Absent Bad Faith Would Be Inconsistent With ERISA's Objectives.

In resolving questions that arise under ERISA, the Court looks to trust law as "a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements." *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). Here, the language, structure, and purposes of ERISA reinforce the trust law basis for deferring to a plan administrator's views unless the administrator has acted in bad faith.

As this Court has observed, ERISA is "an enormously complex and detailed statute." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Given this complexity and the corresponding risk of mistakes in the administration of benefit plans, a hair-trigger rule requiring forfeiture of deference based on a mere mistake by a plan administrator would thrust courts into the role of administering pension plans with disturbing frequency. Moreover, because courts have less familiarity than plan administrators with plan terms and their tax implications, having them step into the shoes of plan administrators who commit run-of-the-mill errors would threaten plans with inconsistent interpretations and unexpected liabilities. *See supra* Part I.E (explaining how *Firestone* deference furthers the goals of ERISA).

A hair-trigger rule that invariably strips plan administrators of *Firestone* deference based on good-faith mistakes would also be inconsistent with *Glenn's* admonition that *Firestone* deference should not be subject to arbitrary limitations. The distinction between good-faith and bad-faith errors, by contrast, tracks *Glenn* quite well. Where a trustee has acted in bad faith, that may well be a "circumstance[] suggest[ing] a higher likelihood" that the benefits decision on remand is suspect, and courts should give such a "factor" appropriate weight. *Glenn*, 128 S. Ct. at 2351. But where there is no such reason for suspicion, the mistake "should prove less important," even "to the vanishing point." *Id.*; *see also Cent. States*, 472 U.S. at 568 (according "significant weight" to a trustee's views where "[t]here has been no evidence of a bad-faith motive behind the trustees' determination of the scope of their powers under the trust agreement").

For those reasons, a number of Circuits have held that ERISA plan administrators are entitled to deference in determining benefits even after arbitrarily and capriciously denying benefits to a participant. *See, e.g.*, *Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353, 1353-54 (11th Cir. 2008); *Pakovich*, 535 F.3d at 605-06; *Vizcaino*, 120 F.3d at 1013-14; *see also Pete* v. *United Mine Workers of Am. Welfare & Ret. Fund of 1950*, 517 F.2d 1275, 1286 (D.C. Cir. 1975) (en banc) (pre-ERISA pension plan). To rule otherwise would, as the Ninth Circuit recognized, improperly intrude upon the discretion conferred by the plan document and "encourage the dumping of

difficult and discretionary decisions into the laps of courts." *Vizcaino*, 120 F.3d at 1014.[17]

---

[17] Though a distinct body of jurisprudence, administrative law provides a potential analogy to the Plan Administrator's exercise of discretion following judicial correction of his initial mistake. In *Negusie* v. *Holder*, 129 S. Ct. 1159 (2009), the administrative agency initially erred in construing a statutory provision, which it had thought was unambiguous. Rather than supply its own construction of the statute, this Court held that the mistaken agency should be given another chance to "exercise[] its *Chevron* discretion to interpret the statute in question." *Id.* at 1167. Under the "ordinary 'remand' rule," when an agency errs, "'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Id.* (quoting *Gonzales* v. *Thomas*, 547 U.S. 183, 186 (2006)). "This remand rule exists, in part, because 'ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.'" *Id.* (quoting *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)); *see also* 3 R. Pierce, Administrative Law Treatise § 18.1, at 1323-24 (4th ed. 2002) ("A reviewing court can order an agency to provide the relief it denied only in the unusual case where the court concludes that the underlying law and facts are such that the agency *has no discretion to act in any other manner*. . . ." (emphasis added)). Where an ERISA Plan expressly includes "delegations of authority to the [administrator] to fill the [plan] gap in reasonable fashion," and there is no reason to suspect that the administrator's initial mistake will infect future determinations, it is likewise inappropriate to strip the administrator of "[*Firestone*] discretion to interpret the [plan terms] in question." *Negusie*, 129 S. Ct. at 1167.

3. The Plan Administrator Did Not Interpret The "Same" Plan Terms On Remand.

Respondents and the government have argued that the Plan Administrator merely offered a different interpretation of the same Plan terms following the remand from *Frommert I* and that, at least in these circumstances, no deference is due to the Plan Administrator's interpretation of the Plan. This argument is incorrect.

First, the Plan terms interpreted on remand were not the same as those upon which the Plan Administrator based its original benefits determination. Since the early 1980s, the Plan Administrator has calculated the benefits of rehired employees pursuant to the reconstructed account methodology. *Id.* at 83a-84a. *Frommert I* held that this methodology could not be applied to employees rehired before 1998. *Id.* at 51a-52a. Thus, on remand, the Plan Administrator was faced with the *new* task of construing the non-duplication of benefits provision and the other pre-1998 Plan terms standing alone, without reference to the reconstructed account methodology.

The Second Circuit recognized that the interpretive issue triggered by its decision was a new one, observing that the task on remand would be "difficult[] . . . because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated." Pet. App. 51a. Accordingly, the question whether a plan administrator is entitled to deference when it

interprets the "same plan terms" a second time is not presented here. Rather, the newly-framed question of how the offset should be applied based on the "pre-amendment plan terms" arose for the first time on remand.[18]

Second, as discussed above, trust law principles support deference to plan administrators who make good-faith mistakes in denying benefits. That rule draws no distinction between cases where the original mistake happens to involve the "same" plan terms and cases involving different plan terms. Indeed, in cases in which a trustee mistakenly denies support to a beneficiary altogether (*see supra* Part I.E.1), the "same" trust provision is generally at issue in determining the amount of support due the beneficiary. Accordingly, a "one-strike-and-you're-out" rule is inconsistent with the law of trusts as well as the goals of ERISA.

4. The Contention That The Plan Is "Silent" Is Incorrect And Inapposite.

The government has also argued that the Plan is "silent" regarding the offset for prior distributions and, accordingly, that the Plan Administrator's interpretation was not entitled to *Firestone* deference

---

[18] This case thus falls into the category of cases holding that plan administrators are entitled to deference when an issue of plan interpretation "d[oes] not ripen into an 'apple' ready to be bitten" until after an initial court ruling. *Pakovich*, 535 F.3d at 606; *accord Gallo*, 102 F.3d at 923; *see also Oliver*, 546 F.3d at 1354; *Vizcaino*, 120 F.3d at 1014; *Pete*, 517 F.2d at 1283.

because there was nothing to interpret. This argument is also incorrect.

The Plan is not silent, as the Second Circuit recognized. Rather than holding that the pre-1998 Plan terms were "silent" regarding the offset, the court of appeals held that those Plan terms were "ambiguous." Pet. App. 51a. To be sure, the court also stated in passing that the pre-1998 Plan "did not *specify* how the Plan would account for the prior distributions," *id.* 28a-29a (emphasis added), but to "specify" means "[t]o state explicitly," Webster's II New College Dictionary (3rd ed. 2005). Failure to state something *explicitly* is entirely consistent with ambiguity. And ambiguity is not a grounds to deny deference but a predicate for deference.

Any assertion that the Plan is "silent" regarding the offset is foreclosed by the Plan's non-duplication of benefits provision and its definition of "accrued benefit." The non-duplication of benefits provision expressly directs that the pension benefits of rehired employees be offset "by the *accrued benefit* attributable to [prior] distribution[s]." *Id.* at 141a (emphasis added). As the Plan Administrator explained, this provision – together with the Plan's definition of the term "accrued benefit" – directs that rehired employees' benefits be offset based on the present-day economic value, or "actuarial equivalent," of their initial lump sum distributions. *See infra* Part II.B.

Even if the Plan *were* silent, moreover, that would not justify withholding deference from the Plan Administrator. As the Seventh Circuit has

recognized, it "is implicit in the idea of deferential review" that where "the plan document does not furnish the answer to [a] question, the answer given by the plan administrator . . . will ordinarily bind the court." *Gallo*, 102 F.3d at 922. Here, the Plan vests the Plan Administrator with the authority to "rectify [any] omission" in the Plan. Pet. App. 142a. Thus, even were the Plan silent, that fact would be a circumstance requiring deference, not a ground for withdrawing it.

* * * * * *

In sum, none of the reasons offered by the court of appeals, Respondents, or the government for carving out an exception to *Firestone* deference is persuasive. Consistent with this Court's decisions in *Firestone*, *Glenn*, and *Central States* and with ERISA's goals of uniform, predictable, and simple plan administration, the Plan Administrator's reasonable interpretation of the non-duplication of benefits provision should have been accorded deference.

II. ABSENT DEFERENCE TO THE PLAN ADMINISTRATOR, A CLAIM FOR BENEFITS DUE UNDER THE TERMS OF AN ERISA PLAN IS SUBJECT TO *DE NOVO* REVIEW.

The Second Circuit, after declining to defer to the Plan Administrator's interpretation of the Plan, erroneously deferred to the district court's interpretation. Under settled principles of appellate review, appellate courts do not defer to a district court's interpretation of a written instrument, including an ERISA plan. The Second Circuit

nonetheless reviewed the district court's interpretation of the pre-1998 Plan terms only for "an excess of allowable discretion." Pet. App. 11a. Applying this deferential standard of review, the Second Circuit upheld the district court's interpretation despite its observation that this interpretation "apparently" fails to make "any . . . adjustment to reflect the inflation-adjusted values of the prior distributions." *Id.* at 9a.

The Second Circuit should have reviewed the district court's interpretation of the Plan *de novo*. The district court's interpretation cannot be sustained under that standard: it ignores relevant Plan language, is economically irrational, and treats employees who left Xerox and then returned to the company better than similarly-situated employees whose service was uninterrupted.

A. The Court Of Appeals Erred By Applying A Deferential Standard Of Review To The District Court's Interpretation Of The Plan.

"[A]ppellate courts have untrammeled power to interpret written documents." *Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157, 163 (2d Cir. 1947) (L. Hand, J.). Absent *Firestone* deference to the plan administrator, this rule applies to the interpretation of ERISA plans. *See Brubaker* v. *Metro. Life Ins. Co.*, 482 F.3d 586, 589 (D.C. Cir. 2007) ("appellate courts interpret benefit plan documents de novo" (citing *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 210 (2004))); *Booth* v. *Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan*, 201 F.3d 335, 340 (4th Cir.

2000) ("ERISA plans . . . are interpreted *de novo*."); *Dang* v. *UNUM Life Ins. Co. of Am.*, 175 F.3d 1186, 1189 (10th Cir. 1999) ("Interpretation of the plan . . . under ERISA" is "reviewed de novo.").

The district court's task on remand was to interpret the pre-1998 terms of the Plan. In *Frommert I*, the Second Circuit instructed the district court to "fashion[] the appropriate remedy" by interpreting "the pre-amendment terms of the Plan describ[ing] how prior distributions were to be treated." Pet. App. 51a. *Frommert I* also dismissed Respondents' claim for equitable relief pursuant to 29 U.S.C. § 1132(a)(3). Pet. App. 53a. The court of appeals did so because the relief Respondents sought – "recalculation of their benefits *consistent with the terms of the Plan*" – "falls comfortably within the scope of § [1132](a)(1)(B)." Pet App. 53a (emphasis added).

The Second Circuit nonetheless reviewed the district court's interpretation of the pre-1998 Plan terms only "for an excess of allowable discretion" and upheld the district court's interpretation as "one reasonable approach among several reasonable alternatives." Pet. App. 8a, 13a-14a. The Second Circuit should not have applied this deferential standard of review.

In *Firestone*, this Court held that, absent a grant of discretion to the plan administrator, "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard." *Firestone*, 489 U.S. at 115. This standard of review does not change merely because the district court interprets the plan

in the course of fashioning a remedy. That is so because a district court's remedial discretion does not extend to the interpretation of written instruments. *See, e.g., Yolton* v. *El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 577-78 (6th Cir. 2006) (where district court granted preliminary injunction in favor of ERISA plan beneficiaries, review was *de novo* insofar as district court's decision was based on interpretation of ERISA plan because "[q]uestions of contract interpretation are generally considered questions of law subject to *de novo* review" (internal quotation marks omitted)).[19]

Larocca v. *Borden, Inc.*, 276 F.3d 22 (1st Cir. 2002), illustrates this principle. In *Larocca*, the parties agreed that the plaintiffs had been improperly terminated from their employer-

---

[19] *See also Duthie* v. *Matria Healthcare, Inc.*, 540 F.3d 533, 537 (7th Cir. 2008) ("We ultimately review whether a district court should have granted a preliminary injunction for an abuse of discretion. The likelihood of the success on the merits in this case depends on the soundness of the district court's interpretation of the Agreement's language, however, and we review a district court's interpretations of the merger agreement de novo." (citations omitted)); *In re Estate of Trevino*, 886 N.E.2d 530, 533 (Ill. App. Ct. 2008) ("even though the order . . . is one imposing the equitable remedy of a constructive trust, our review is *de novo*" because the issue is "whether the marital settlement agreement provided a *legal basis* for the trial court's order" (citations omitted; emphasis in original)).

Similarly, "to the extent the district court's selection of an equitable remedy involves an element of statutory interpretation, its conclusions are reviewed *de novo*." *CFTC* v. *Levy*, 541 F.3d 1102, 1110 (11th Cir. 2008); *accord Halbach* v. *Great-West Life & Annuity Ins. Co.*, 561 F.3d 872, 882-83 (8th Cir. 2009) (same).

sponsored medical plan, and so should be "constructively reinstated." In implementing this remedy, the district court ordered reimbursement for a deceased plaintiff's estate notwithstanding a plan provision that "prohibit[ed] benefit payments" in the circumstances of his case. *Id.* at 31. In reversing the district court's decision, the First Circuit explained that "once the district court mandated the plaintiff['s] constructive reinstatement" in the plan, his "claims were governed by the terms of the Plan." *Id.* at 29. Accordingly, "the proper scope of remedies due . . . is a legal issue that we review *de novo*." *Id.* at 26.

This Court's decisions support the same result. Even when a district court has discretion to fashion a remedy, the court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990). In *Litton Finanical Printing Division* v. *NLRB*, 501 U.S. 190 (1991), moreover, the Court held that NLRB interpretations of collective bargaining agreements are subject to *de novo* review. The Court declined to apply a deferential standard of review even though the Board has "considerable authority to structure its remedial orders." *Id.* at 201-03.

The Second Circuit's application of a deferential standard of review in this case exposes ERISA plans to the troubling prospect that different district courts may adopt different interpretations of the very same ERISA plan. Under the Second Circuit's approach, if two district courts within the same circuit were to adopt inconsistent interpretations of the same

pension plan, the court of appeals would be required to affirm *both* interpretations so long as both were within the district courts' zone of "allowable discretion." Such a result would undermine ERISA's goal of ensuring uniform administration of ERISA plans throughout the country. *See Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001) ("One of the principal goals of ERISA is to enable employers to establish a uniform administrative scheme." (internal quotation mark omitted)); *Berger* v. *AXA Network LLC*, 459 F.3d 804, 814 (7th Cir. 2006) ("uniformity of treatment" of plan participants is a "primary concern" of ERISA). The prospect of such discordant results would also discourage employers from offering ERISA plans in the first place. *See Varity*, 516 U.S. at 497.

In short, the Second Circuit's decision to substitute deferential review for *de novo* review is contrary to fundamental principles of appellate review and conflicts with important objectives of ERISA. The Second Circuit should not have deferred to the district court's interpretation of the Plan.

B. Under A *De Novo* Standard Of Review, The Plan Should Be Interpreted To Account For The Time Value Of Money In Calculating Respondents' Benefits Under The Plan.

The Second Circuit's opinion carefully avoids the conclusion that the district court's interpretation of the pre-1998 Plan terms is superior to the Plan Administrator's interpretation. *See, e.g.*, Pet. App.

13a-14a (the district court selected "one reasonable approach among several reasonable alternatives"). Nor would any such a conclusion be sustainable. The district court's interpretation fails to give effect to relevant Plan terms, ignores the time value of money, and confers windfalls on rehired employees. In contrast, the Plan Administrator's interpretation is consistent with the terms of the Plan and IRS guidance, accounts for the time value of money, and avoids undue windfalls.

1. The Plan's HAP defined benefit formula calculates benefits for rehired employees by taking account of all of the employees' service to Xerox, including service rendered before their rehire date. *Id.* at 25a-26a. Absent an appropriate offset to take account of the distributions that rehired employees received upon their initial departures, such employees would receive double credit for their initial period of service. *See id.* at 26a.

The Plan's non-duplication of benefits provision prohibits such "duplicative" payments. That provision requires that the HAP formula benefit of a rehired employee be "offset by the *accrued benefit* attributable to [the prior] distribution" to the rehired employee. *Id.* at 141a (emphasis added). The Plan defines the term "accrued benefit," in pertinent part, as "[t]he normal retirement benefit which a [participant] has earned up to any date, and which is payable at Normal Retirement Date" – *i.e.*, as an annuity payable (in most cases) at age 65. *Id.* at 134a; *see* J.A. 15a-16a.

As the Plan Administrator explained in the course of interpreting the Plan on remand, such an offset requires that the prior distribution be converted into an annuity because the HAP formula expresses a participant's accrued benefit as a monthly annuity. Pet. App. 152a; *see also id.* at 149a. The Plan, moreover, specifies that the calculation of the monthly annuity attributable to a defined contribution account balance must be made "using annuity rates established by the PBGC." *Id.* at 141a (Plan Section 4.3(e)); *see id.* at 150a. Accordingly, as the Plan Administrator concluded, Respondents' prior distributions from their defined contribution accounts should be "converted into an age 65 annuity as of the time of the prior distribution" using PBGC annuity rates and then offset against the annuity provided by the HAP formula. *Id.* at 152a-153a (¶¶ 17-19). This interpretation is amply supported by the terms of the pre-amendment Plan.

The district court's interpretation, in contrast, disregards the language of the Plan. It does not offset the final pension benefits by the "accrued benefit attributable to" the prior distribution. Instead, it offsets the final benefits only by the nominal amount of the prior distribution, without *any* adjustment at all for the time value of money.

2. Because the district court's nominal offset interpretation fails to account for the time value of money, it is economically irrational and unfair to Respondents' fellow employees. *See, e.g.*, *Lunn*, 166 F.3d at 882-83 (holding that an economically nonsensical interpretation of a plan that results in

windfalls is unreasonable as a matter of law if there is any other plausible interpretation of the plan).

Under the district court's interpretation, rehired employees will receive a level of benefits that is higher than the benefits available to otherwise similarly-situated Xerox employees. J.A. 127a-30a; *see id.* at 104a-16a; 131a-41a. Respondent Clair, for example, stands to receive substantially more money in real terms than an otherwise identical employee who had not departed Xerox for two years would have received. *Id.* at 109a-10a. Respondents' own expert recognized the inequity of this approach. *Id.* at 130a (agreeing that, "in fairness, to account for th[e time value of money], you would have to do some actuarial equivalence of th[e] lump sum to account for its value . . . today"). Indeed, even Mr. Clair acknowledged that he was "familiar with the time value of money concept" and that he did not expect to receive a benefit as large as that provided under the nominal offset approach. *Id.* at 118a; 122a-24a.

The undisputed purpose of the Plan's non-duplication of benefits provision was to prevent windfalls. Accordingly, the Plan should not be interpreted in a manner that requires them. *See Benefits Comm. of Saint-Gobain Corp.* v. *Key Trust Co. of Ohio, N.A.*, 313 F.3d 919, 932 (6th Cir. 2002) (purpose of ERISA is "not to obtain windfalls for the participants"); *Harms* v. *Cavenham Forest Indus., Inc.*, 984 F.2d 686, 693 (5th Cir. 1993) (unearned windfalls are "abhorred by ERISA").

Moreover, accounting for the time value of money is consistent with IRS guidance on floor-offset

arrangements. In Revenue Ruling 76-259, the IRS required such arrangements to take account of "the additional amount that would have been provided" by a prior distribution when calculating the floor benefit due under the defined benefit portion of the arrangement. *See* Rev. Rul. 1976-2 C.B. 111. The IRS also issued a safe harbor regulation for floor-offset plans under which the "accrued benefit" otherwise payable under a defined benefit plan is reduced by the "actuarial equivalent" of any prior distributions received from a defined contribution plan. *See* Pet. App. 148a-49a (citing 26 C.F.R. § 1.401(a)(4)-8(d)(1)(i)). Unlike the district court's interpretation of the Plan, Petitioners' interpretation tracks this regulatory guidance.

In sum, under a *de novo* standard of review, the pre-1998 Plan terms are best interpreted to require that Respondents' final pension benefits be offset by the actuarial equivalent of the prior lump sum distributions they received.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

MICHAEL D. RYAN
XEROX CORPORATION
45 Glover Avenue
Norwalk, CT 06856

MARGARET A. CLEMENS
NIXON PEABODY LLP
Clinton Square
P.O. Box 31051
Rochester, NY 14603

ROBERT A. LONG, JR
ROBERT D. WICK
Counsel of Record
RICHARD C. SHEA
ROBERT S. NEWMAN
JONATHAN L. MARCUS
CHRISTIAN J. PISTILLI
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

Counsel for Petitioners

September 2009

APPENDIX

APPENDIX

RELEVANT STATUTORY PROVISIONS

Title 26 – Internal Revenue Code

*****

Sec. 411. Minimum vesting standards

(a) General rule

*****

(7) Accrued benefit

(A) In general

For purposes of this section, the term "accrued benefit" means

(i) in the case of a defined benefit plan, the employee's accrued benefit determined under the plan and, except as provided in subsection (c)(3), expressed in the form of an annual benefit commencing at normal retirement age, or

(ii) in the case of a plan which is not a defined benefit plan, the balance of the employee's account.

*****

Title 29 - Labor

Sec. 1002. Definitions

*****

(16)(A) The term "administrator" means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

*****

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and

any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

*****

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant--

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

*****

Sec. 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall--

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide--

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

Sec. 1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that--

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with

the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

*****

Sec. 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

*****

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

*****

Sec. 1105. Liability for breach of co-fiduciary

*****

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

*****

Sec. 1108. Exemptions from prohibited transactions

*****

(c) Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from--

*****

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

*****

Sec. 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

*****

Sec. 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

*****

Sec. 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall--

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
OCT 13 2009
OFFICE OF THE CLERK

No. 08-810

B083

In The
Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,
Petitioners,

v.

PAUL J. FROMMERT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

SHAUN P. MARTIN
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW
5998 Alcalá Park
San Diego, CA 92110
(619) 260-2347

PETER K. STRIS
Counsel of Record
3333 Harbor Blvd.
Costa Mesa, CA 92626
(714) 444-4141, ext. 215
peter.stris@strismaher.com

JOHN A. STRAIN
LAW OFFICES OF JOHN A. STRAIN
321 12th Street, Suite 101
Manhatan Beach, CA 90266
(310) 802-1300

BRENDAN S. MAHER
STRIS & MAHER LLP
1920 Abrams Pkwy., #430
Dallas, TX 75214
(214) 224-0091

Counsel for Respondents

November 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Whether the court of appeals applied correct standards of review in this denial-of-benefits case under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001 et seq., when it concluded that: (a) the administrator of an ERISA plan whose denial of benefits violated ERISA was not entitled to deference regarding its opinion on how to remedy the violation and (b) the district court's choice of remedy should be reviewed for abuse of discretion.

PARTIES TO THE PROCEEDING

The Petitioners in this case are present or former Xerox Corporation Pension Plan Administrators Sally L. Conkright, Patricia M. Nazemetz, and Lawrence M. Becker, as well as the Xerox Corporation Retirement Income Guarantee Plan.

The Respondents in this case are Paul J. Frommert, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillian, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski, Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Kenneth W. Pietrowski, Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Dennis E. Bains, Kathleen E. Hunter, John L. Crisafulli, Deborah J. Davis, Brenda H. McConnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Claudette

M. Long, Dale Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Carter, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Gail J. Levy, John A. Williams, Crystal Thorton, Charles R. Drannbauer, William M. Burritt, Janice Ross Heiler, Thomas F. McGee, Vincent G. Johnson, F. Colt Hitchcock, Ronnie Tabak, Martha Lee Taylor, Charles Willette and Richard J. Glikin.

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES viii

INTRODUCTION 1

COUNTERSTATEMENT 4

A. Statutory Background 5

1. Defined contribution plans 6

2. Defined benefit plans 6

3. The regulation of pension plans 7

B. The Xerox RIGP (Pre-1989) 9

1. The accrued benefit 10

2. The floor-offset arrangement 11

3. The treatment of prior distributions .. 14

C. The 1989 Restatement 18

1. The accrued benefit 18

2. The treatment of prior distributions .. 20

D. Procedural History 22

1. Pre-litigation events 22

2. District court (the initial proceedings) . 26

3. 2006 court of appeals (*Frommert I*) ... 29

4. District court (remand proceedings) ... 32

5. 2008 court of appeals (*Frommert II*) ... 39

SUMMARY OF ARGUMENT 40

ARGUMENT 43

I. THE SECOND CIRCUIT WAS NOT REQUIRED TO AFFORD DEFERENCE TO XEROX. 43

A. The Size of the Offset Applicable to Respondents Under the 1989 Restatement Is the Same Issue on Which the Administrator's Previous View Was Found to Be "Arbitrary and Capricious." 46

B. In the Aftermath of an Administrator's Abuse of Discretion, ERISA Does Not Require "Rerun Deference" on the Same Issue. 48

C. Even If ERISA Requires a Court To Grant Rerun Deference, It Surely Does Not Require Deference to Strategic Litigation Positions Which Contradict Administrative Practice. 54

D. The Holding Xerox Attributes to the Second Circuit Is Demonstrably False. 56

II. THE SECOND CIRCUIT PROPERLY APPLIED AN ABUSE OF DISCRETION STANDARD IN AFFIRMING THE DISTRICT COURT. 58

A. In 2006, the Second Circuit Interpreted the 1989 Plan and Concluded That Its Plain Text Permitted a Range of Offset Methods. 58

B. The District Court Selected an Appropriate Offset Method. 60

C. Applying the Correct Standard of Review, the Second Circuit Affirmed the District Court. 61

III. EVEN IF THE CHOICE OF OFFSET METHOD SHOULD HAVE BEEN REVIEWED *DE NOVO*, THE JUDGMENT MUST BE AFFIRMED. 62

A. The Offset Method Selected by the District Court Is the Best Approach 63

B. Xerox Has Repudiated the New Hire Approach. 63

C. The Administrator's Approach Is Indefensible. 65

CONCLUSION 66

APPENDIX (Fold-Out Exhibits)

Chart #1: A Typical Floor-Offset Arrangement 2b

Chart #2: Respondents' Pre-1989 Distributions 3b

Chart #3: The Pre-1989 Phantom Account Offset 4b

TABLE OF AUTHORITIES

CASES

Berger v. Nazametz,
157 F.Supp.2d 998 (S.D. Ill, 2001) 13

Berger v. Xerox Corp. Retirement Income Guarantee Plan et al.,
338 F.3d 755 (CA7 2003) 19

Bowen v. Georgetown University Hosp.,
488 U.S. 204 (1988) 54

Brewer v. Muscle Shoals Board of Education,
790 F.2d 1515 (CA11 1986) 61

Burlington Truck Lines, Inc. v. United States,
371 U.S. 156 (1962) 55

Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.,
472 U.S. 559 (1985) 51

Downie v. Independent Drivers Ass'n Pension Plan,
934 F.2d 1168 (CA10 1991) 62

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 48, 55, 57, 58

In re Navigation Technology Corp.,
880 F.2d 1491 (CA1 1989) 61

Lemon v. Kurtzman,
411 U.S. 192 (1973) 49

Metropolitan Life Insurance Co. v. Glenn,
128 S.Ct. 2343 (2008) 48, 49

Miller et al. v. Xerox Corporation Retirement Income Guarantee Plan et al.,
464 F.3d 871 (CA9 2006), *cert. denied*, 549 U.S. 1280 (2007) 17

Restaurant Operators, Inc. v. Jenney,
128 N.H. 708 (N.H. 1986) 61

Smiley v. Citibank (South Dakota), N.A.,
517 U.S. 735 (1996) 55

Varity Corp. v. Howe,
516 U.S. 489 (1996) 49, 50

Vizcaino v. Microsoft Corp.,
120 F.3d 1006 (CA9 1997) 53

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982) 19

STATUTES

26 U.S.C. 401(a) 5
26 U.S.C. 401(a)(25) 8
26 U.S.C. 402-404 5
26 U.S.C. 411(a)(7)(A)(i) 7
26 U.S.C. 411(a)(7)(A)(ii) 6
29 U.S.C. 1002(23)(A) 7, 10
29 U.S.C. 1002(23)(B) 6, 35, 63
29 U.S.C. 1002(34) 6
29 U.S.C. 1002(35) 6
29 U.S.C. 1022 ..... 8, 26, 64, 66
29 U.S.C. 1022(a) 35

29 U.S.C. 1053 ..... 18, 27
29 U.S.C. 1053-1054 29
29 U.S.C. 1054(b)(1) 64
29 U.S.C. 1054(d)(1) 64
29 U.S.C. 1054(e) 64
29 U.S.C. 1054(g) 27
29 U.S.C. 1054(h) 27
29 U.S.C. 1081-1086 8
29 U.S.C. 1102(34) 6
29 U.S.C. 1102(b)(4) 8
29 U.S.C. 1104(a)(1)(D) 51
29 U.S.C. 1110 51
29 U.S.C. 1132(a)(1)(B) 26, 27, 57, 58
29 U.S.C. 1132(a)(2) 56, 57, 58
29 U.S.C. 1132(a)(3) 56, 57, 58
29 U.S.C. 1133 55
29 U.S.C. 1202(c) 5

REGULATIONS

26 C.F.R. 1.401-1(b)(1)(i) 6, 8
29 C.F.R. 2560.503-1(g) 55

OTHER AUTHORITIES

2 Restatement (Third) of Trusts § 50 & cmt. b (2003) 50

3 Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 187, 187.2, 187.3 (4th ed. 1988) . 50

Edward A. Zelinsky, The Defined Contribution Paradigm, 114 Yale L. J. 451 (2004) 7

Emp. Benefit Res. Inst., *Fundamentals of Employee Benefit Programs* 56 (5th ed. 1997) 7

George G. Bogert & George T. Bogert, The Law of Trusts & Trustees § 560 (rev. 2d ed. 1980) (Bogert) 49

James A. Wooten, *The Employee Retirement Income Security Act of 1974, a Political History* 1 (2004) 5

Restatement (Second) of Trusts § 187, cmt b 50

Rev. Rul. 74-385, 1974-2 C.B. 130 8

Stephen J. Krass, *The Pension Answer Book* 1 (2001) 5

INTRODUCTION

Respondents, longtime employees of the Xerox Corporation ("Xerox"), were all rehired after a break-in-service. Each continued to work at Xerox for a substantial time thereafter. This dispute is over the amount of pension benefits due to respondents upon retirement from Xerox after that post-rehire period.

Rehired employees (like respondents) have often previously received benefit payouts from a company pension plan. Accordingly, plan sponsors may provide that benefits earned during a second stint of service will be "offset" in some way by monies received during the first stint. In simple economic terms, increasing the offset is equivalent to decreasing the new pension.

Plans can, and do, impose offsets of varying sizes. For example, one plan may offset the entirety of monies previously received; another might offset only fifty percent. Generally speaking, plans are free to construct offsets in accordance with the compensation bargain they wish to strike with employees. Federal law, however, imposes several important requirements regarding the manner in which any such offset must be defined in the plan and communicated to employees.

From 1977 to 1989, Xerox included in its pension plan what it has always called a "phantom account offset." This offset purported to allow Xerox to deduct from a rehired employee's pension a "phantom" amount derived from hypothetical investment gains on monies paid years ago by a separate Xerox plan. This phantom offset was extraordinarily aggressive in valuing past distributions. Were it applied to

respondents, many would receive absolutely no pension for *years* of post-rehire work. As the Ninth Circuit held in 2006, the Xerox phantom account offset is illegal.

This lawsuit, however, is not about the legality of the phantom offset. That is so because, in 1989, as part of a major benefits redesign, *Xerox admittedly removed the phantom offset from its plan*. For the next five years, Xerox sent documents to respondents indicating that the company would deduct from their pensions only the *actual* monies they had previously received. In 1995, however, Xerox did an about-face. It informed respondents that the company would use the phantom offset to eliminate (or dramatically reduce) their pensions. Respondents objected, and after administrative resolution of the dispute proved unsuccessful, this lawsuit was filed.

In the district court, Xerox conceded that it had removed the phantom offset from the 1989 Plan. In moving for summary judgment, Xerox introduced extrinsic evidence regarding (i) its historical operation of the plan and (ii) post-1989 plan amendments and disclosures. Relying on this extrinsic evidence, Xerox argued that the 1989 Plan's generic "non-duplication" provision should be read to authorize imposition of the phantom account offset. The district court granted the motion and dismissed the complaint.

The Second Circuit reversed. While it agreed that the generic non-duplication provision in the plan could justify *some* offset, it rejected Xerox's attempted resurrection of the *phantom* offset as "arbitrary and capricious." This was not surprising. Xerox had *itself* removed the relevant offset language. And Xerox had

provided respondents, *for five years*, with personalized documents indicating that the offset would be limited to the monies that respondents had *actually received*.

In the aftermath of Xerox's abuse of discretion, the Second Circuit remanded the case. It did so having concluded that "rehired employees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received." Pet. App. 47a. And it urged the district court "to employ equitable principles when determining the appropriate [offset] calculation." Pet. App. 51a. Xerox did not seek further review in this Court. Instead it submitted an extensive "remedial proposal," A151, which it has proceded to unsuccessfully litigate for three years.

On remand, the district court held two days of hearings. After considering testimony and evidence submitted by the parties, the court held that Xerox could offset *no more than* the payments that respondents actually received. In its decision, the court emphasized that such an offset "most clearly reflects what a reasonable employee would have anticipated." Pet. App. 107a. The Second Circuit affirmed.

Now, Xerox urges this Court to reverse the Second Circuit and, in so doing, start this ten year old case virtually anew. It suggests two grounds for reversal. Xerox's primary argument is that the court of appeals was obligated to defer to one of the plan administrator's proposed "remedial approaches" (Xerox's words) regarding offset methodology. Alternatively, Xerox argues that the court of appeals was required to review *de novo* the remedial approach

adopted by the district court. Each of Xerox's arguments is without merit.

The Second Circuit correctly declined Xerox's invitation to expand radically the doctrine of judicial deference. Put simply, federal law does not require a reviewing court to afford deference to an administrator whose earlier position on the *same* issue was held to be arbitrary and capricious. Such "rerun deference" undermines benefit security and increases, rather than decreases, the costs of plan administration.

Nor did the Second Circuit err in reviewing the district court's selection of a remedial approach under an abuse of discretion standard. In any event, Xerox's focus on standards of review is unavailing. The offset methods proposed by Xerox are patently indefensible. And Xerox's claims of "windfall" make little sense given how wage/benefit tradeoffs and efficient labor markets actually work. As such, remand would serve no useful purpose. This Court should affirm the judgment and bring closure to an epic dispute which, sadly, has already outlived some of its original cast.[1]

COUNTERSTATEMENT

In a case as complicated as this one, the temptation is strong to gloss over the record and focus on abstract principles. Xerox, regrettably, succumbs to that temptation in its opening brief, ignoring or mischaracterizing the facts and history of this 10-year litigation. Consequently, respondents must "set the

---

[1] Several respondents have already passed away. And respondents' original counsel died after certiorari was granted.

record straight." To that end, this counterstatement will do three things. First, it will provide necessary statutory background. Second, it will examine the Xerox pension plan. Finally, it will review the relevant procedural history.

A. Statutory Background

No employer is required to sponsor a pension plan. In order to encourage sponsorship, however, the federal government offers significant tax benefits. See Stephen J. Krass, *The Pension Answer Book* 1 (2001) ("A qualified retirement plan is one of the best tax shelters available."); 26 U.S.C. 402-404. These tax benefits are only available to pension plans that satisfy requirements set forth in the Internal Revenue Code ("Tax Code"). See 26 U.S.C. 401(a).

In regulating employer-sponsored pension plans, the Tax Code operates in conjunction with another important federal statute: the Employee Retirement Income Security Act of 1974 ("ERISA").[2] "ERISA was Congress's attempt to devise a comprehensive regulatory program to protect millions of American workers who looked to private pension plans for financial support in their retirement years." James A. Wooten, *The Employee Retirement Income Security Act of 1974, a Political History* 1 (2004).

The statute explicitly distinguishes between two significantly different types of pension plans: "defined

---

[2] ERISA allocates primary responsibility for a great deal of regulation to the Internal Revenue Service. See 29 USC 1202(c).

contribution" (29 U.S.C. 1002(34)) and "defined benefit" (29 U.S.C. 1002(35)).

1. Defined contribution plans

A defined contribution plan is commonly referred to as an "individual account plan." 29 U.S.C. 1102(34). That is because an employee who participates in such a plan is assigned an individual account within the plan to which money is contributed by the employee and/or the employer. *Id.*

The employee is the beneficial owner of the funds allocated to his or her individual account. And, at any given time, the account balance is equal to the total amount of past contributions adjusted to reflect the account's share of: (1) any income or expenses, (2) any gains or losses, and (3) any forfeitures of other participants' accounts. *Id.*

A defined contribution plan does not promise a specific amount of benefits at retirement. The employee's retirement benefit is simply the balance of his or her account. See 29 U.S.C. 1002(23)(B); 26 U.S.C. 411(a)(7)(A)(ii).

2. Defined benefit plans

Unlike a defined contribution plan, a defined benefit plan is intended "to provide systematically for the payment of definitely determinable benefits to * * * employees over a period of years, usually for life, after retirement." 26 C.F.R. 1.401-1(b)(1)(i).

The amount of the benefit is calculated pursuant to a formula that customarily takes into account the

participant's years of service and compensation. See Emp. Benefit Res. Inst., *Fundamentals of Employee Benefit Programs* 56 (5th ed. 1997).

Generally speaking, the specific formulas used by a defined benefit plan are a matter of contract. See 29 U.S.C. 1002(23)(A); 26 U.S.C. 411(a)(7)(A)(i). As explained below, however, both ERISA and the Tax Code include strict requirements regarding the manner in which the benefit must be defined in the plan and communicated to employees.

3. The regulation of pension plans

Defined contribution plans are designed to permit employees to experience the rewards (and, thus, bear the risk) of investment performance. See Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L. J. 451 (2004). See also Brief for Petitioners 4 (hereinafter "Pet. Br."). As such, the regulation of defined contribution plans is focused on ensuring that employees understand the suitability and desirability of available investment options.

By contrast, defined benefit plans are nothing more than subsidized deferred compensation arrangements. The thinking is simple: an employee will be indifferent as between (1) $X in current salary and (2) a guaranteed future income stream (i.e., a pension) also worth $X. But if the pension is subject to more favorable tax treatment, that same employee may well choose to forego $X or more in current pre-tax wages in exchange for a pension whose pre-tax value is $X. The government tax-favors pensions in order to encourage private retirement savings.

The success of this subsidized arrangement, however, requires that the guaranteed future income stream (i.e., the pension) be *secure*. Broadly speaking, there are two major risks to that security:

- A plan may not have the financial ability to pay the pension when it becomes due.

- An employee may forgo wages in exchange for a pension that turns out to be much smaller than he or she reasonably expected.

Both ERISA and the Tax Code include many provisions designed to mitigate these risks.[3]

In particular, ERISA requires that all plans "specify the basis on which payments are made * * * from the plan." 29 U.S.C. 1102(b)(4). And the Tax Code makes clear that, in the case of defined benefit plans, this must be done "in a way which *precludes employer discretion*." 26 U.S.C. 401(a)(25) (pertaining to "actuarial assumptions") (emphasis added). See also 26 C.F.R. 1.401-1(b)(1)(i) (requiring that a plan provide "definitely determinable benefits"); Rev. Rul. 74-385, 1974-2 C.B. 130 (confirming that benefits are definitely determinable when computed via a fixed formula and "not within the discretion of the employer").

ERISA also includes significant disclosure requirements. See, *e.g.*, 29 U.S.C. 1022 (requiring that

---

[3] Numerous provisions in ERISA deal with the risk of plan insolvency. See, *e.g.*, 29 U.S.C 1081-1086 (funding rules). None is directly relevant here.

all participants receive a summary plan description "written in a manner calculated to be understood by the average plan participant" which contains, among other things, "a description of the provisions providing for nonforfeitable pension benefits").

These requirements are of particular importance in the context of *defined benefit* plans. Put simply, an employee cannot make an informed decision to forgo current wages in exchange for a pension if he or she does not know how that pension will ultimately be calculated.

B. The Xerox RIGP (Pre-1989)

Respondents began working for Xerox at various points between 1960 and 1985. JA 142a - 143a. Prior to 1989, each participated in *two* pension plans sponsored by Xerox. One is the Retirement Income Guarantee Plan (the "RIGP").[4] It is a defined benefit plan. The other was the Profit Sharing and Retirement Savings Plan (the "PSP"). It was a defined contribution plan.

Respondents left Xerox at various times before 1989 and received lump-sum distributions *solely from the PSP*. Pet. App. 25a. At that point, each ceased to be a participant in *any* Xerox plan. Each then had full control over the use of the proceeds received from his or her "cashed-out" individual account. Pet. App. 71a.

---

[4] The RIGP was drafted by Xerox in 1977. It can be found in the Frommert I Appendix at 675-769 (hereinafter, citations to that appendix will take the form "F1A___)." It was completely "restated" (*i.e.*, updated and reprinted in full form) in 1981, 1983, 1985, 1987, 1989, 1993, 1996, 1998, and 1999. F1A771-1451.

Respondents were subsequently rehired by Xerox. Pet. App. 25a. Upon rejoining the company, each was reinstated as a participant *in the RIGP*. Pet. App. 71a. This lawsuit is a dispute over the amount of benefits each respondent is now due from that plan. Its resolution must begin with a basic understanding of the RIGP and its pre-1989 coordination with the PSP.

1. The accrued benefit

Because the RIGP is a defined benefit plan, it must include a definition of the term "accrued benefit." 29 U.S.C. 1002(23)(A). That definition is, and always has been, located in the opening section of the plan:

> Accrued Benefit. The normal retirement benefit which a Member has earned up to any date, and which is payable at Normal Retirement Date in an amount computed in accordance with Section 4.2 * * * *

F1A675. From 1977 until 1989, the text of that section went virtually unchanged. F1A775, 835, 892, and 970.

Section 4.2—the provision explicitly referenced in the above §1.1—provided that "an eligible Member shall be entitled to a monthly normal retirement benefit of the largest of [the formulas set forth in Section 4.2]a, [Section 4.2]b, or [Section 4.2]c below." F1A702. The text of these sub-sections also went virtually unchanged from 1977 until 1989. See F1A702, 793, 851, 910, and 988.

The §4.2 formulas require that several calculations be performed.[5] First, the participant's five highest years of compensation at Xerox are divided by 60. F1A702. This yields his or her "Average Monthly Compensation." F1A684. Next, the participant's Average Monthly Compensation is multiplied by 1 and 2/3%. F1A702. The resulting amount is then multiplied by the total number of years the participant worked at Xerox. F1A696-698, 702. At that point, a base RIGP monthly benefit has been established. F1A702.

To determine the participant's accrued benefit, several deductions are then calculated and subtracted from the base RIGP monthly benefit. The 1977 RIGP included six such deductions. F1A702-703. The 1981, 1983, 1985, and 1987 Restatements each included those same six deductions plus a seventh one. F1A793-794, 851-852, 910-911, and 988-989. As explained below, one such deduction – found in §4.2a(ii) of all pre-1989 Restatements – is at the center of this dispute.

2. The floor-offset arrangement

From 1977 through 1989, the RIGP made explicit mention of a *separate defined contribution plan*, the PSP (i.e., the Xerox Corporation Profit Sharing and Retirement Savings Plan). See F1A691, 782, 842, 900, 978. It did so because the RIGP and PSP coordinated benefits through a complex technique known as a

---

[5] The explanation above is based on §4.2a. But §§4.2b and 4.2c do not differ from §4.2a in any way which is relevant to this case.

"floor-offset" arrangement. Generally speaking, a floor-offset arrangement works as follows:

The defined benefit plan guarantees only a minimum total benefit (i.e., a floor). It does so by utilizing formulas which provide that the accrued benefit under the defined benefit plan is merely the *net* amount (if any) after deducting (i.e., offsetting) the value of the employee's accrued benefit under the defined contribution plan (i.e., his/her account balance). See Appendix 2b, Chart #1, "A Typical Floor-Offset Arrangement" (illustrating the mechanics).

Prior to 1989, the RIGP floor-offset was always found in §4.2a(ii) of the plan. Throughout this brief, respondents will refer to this *critical* provision as the "PSP Offset" because, generally speaking, it reduced an employee's RIGP pension based upon that employee's PSP account balance. Specifically, the PSP Offset reduced the base RIGP monthly annuity by:

> the monthly amount which would be payable under a Life Annuity which could be purchased with the Member's Retirement Account [i.e., *his or her individual account in the PSP*] assuming commencement of such annuity at the same time as the commencement of benefits under the Plan and using the Actuarial Factors ****

F1A702. See also F1A793, 852, 910, and 988 (the relevant 1981, 1982, 1985, and 1987 plan provisions); F1A692; 783-784, 842-843, 901-902, and 979-980 (the relevant 1977, 1981, 1983, 1985, and 1987 plan provisions each defining Retirement Account).

The combined effect of these provisions can be summarized as follows:

> [I]f the RIGP provided a participant with an age 65 monthly annuity of $1,500, and the participant's account in the PSP would provide a $1,000 monthly annuity also commencing at age 65, the participant would receive a total benefit of $1,500, with $500 payable from the RIGP and the remaining $1,000 payable from the PSP. Changing the example slightly, assume the PSP would provide a $1,500 annuity, while the RIGP would provide only a $1,000 annuity. In this situation, the participant would receive the same $1,500 monthly annuity benefit, but the source of the benefit changes: the PSP pays the entire $1,500 annuity, while the RIGP would pay no portion of the benefit.

Berger v. Nazametz, 157 F.Supp.2d 998, 1002 (S.D. Ill, 2001).

Throughout this litigation, it has been undisputed that the prior distributions received by each respondent came from the PSP. In other words, no respondent received any payment from the RIGP. F1A635. That is because the annuitized value of each respondent's PSP account exceeded his or her base RIGP monthly annuity. Put simply, no respondent had *any* accrued benefit under the RIGP. See Appendix 3b, Chart #2, "Respondents' Pre-1989 Distributions" (illustrating the process used to calculate the amount and source of funds distributed to each respondent when he or she initially left Xerox).

3. The treatment of prior distributions

As explained above, the benefit formulas in §4.2 of the RIGP are pegged to years of service with Xerox. These formulas have always given rehired employees credit for *all* years of employment (in some instances capped at 30 years). Pet. App. 63a; Pet. Br. 59.

The RIGP credit for *all* years of service necessarily means that after rehired employees rejoin the RIGP, they will accumulate benefits calculated using both their post-rehire *and pre-rehire* years of employment. But some of these rehired employees may have previously received pension benefits *from the RIGP*; others may (like respondents) have received a prior distribution *from the PSP*; still others may have previously received benefits *from both plans*. This presented an important planning question for Xerox: How, if at all, should these prior distributions be taken into account in calculating the accrued benefit of a rehired employee who rejoins the plan?

Defined benefit plans treat prior distributions in a variety of ways, depending on the compensation bargain they wish to strike with employees. In the words of two of Xerox's own *amici*:

> Just as defined benefit plans include offsets for a variety of different retirement arrangements, defined benefit plans utilize a variety of different methodologies for implementing offsets. For example, some plans include a complete offset, i.e., offset for 100% of the value of the coordinated retirement arrangement, while other plans provide for a partial offset,

> e.g., offset for 50% of the value of the coordinated retirement arrangement.

Brief Amici Curiae of the American Benefits Council and the ERISA Industry Committee in Support of the Petitioner 10, Supreme Court docket #06-962 (brief filed in support of petition for writ of certiorari filed in *Miller et al. v. Xerox Corporation Retirement Income Guarantee Plan et al.*, 464 F.3d 871 (CA9 2006), cert. denied, 549 U.S. 1280 (2007)).

Xerox was aware of this important consideration. Prior to 1989, the RIGP included two provisions designed to address the effect of a rehired employee's prior distributions.

The Non-duplication Provision. The first relevant section of the pre-1989 RIGP was a stand-alone "non-duplication" provision. Found in §9.6 of the plan, it read as follows:

> Nonduplication of Benefits. In the event any part of or all of Member's accrued benefit is distributed to him prior to his Normal Retirement Date, * * * and such Member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

F1A720. See also F1A810, 867, 931, and 1009 (the relevant 1981, 1983, 1985, and 1987 plan provisions). Put simply, the non-duplication provision disclosed a general principle: prior distributions would be

deducted (i.e., offset) in calculating the accrued benefit of a rehired employee under the RIGP.

The PSP Offset and Phantom Account. The second relevant provision in the pre-1989 RIGP was the PSP Offset discussed above. It specified a precise method by which prior distributions from the PSP would be valued for offset purposes.

As explained above, the PSP Offset specifically addressed how an employee's *current* PSP balance would be taken into account in determining his or her accrued benefit under the RIGP. It did so by reducing the base RIGP monthly annuity by "the monthly amount which would be payable under a Life Annuity which could be purchased with the Member's Retirement Account." F1A702.

The PSP Offset also specifically addressed how *prior PSP distributions* would be taken into account in determining the accrued benefit of rehired employees under the RIGP. The reason for this is because of the specific language included in the plan's definition of Retirement Account. That definition read as follows:

> Retirement Account. * * * Where a Member has received a distribution from his Retirement Account* * *, *it shall be assumed* that his actual Retirement Account balance at the relevant time includes an amount equal to the sum so distributed as it would have increased or decreased during the period from the time of the distribution to the relevant time if such sum had been invested in the General Fund under the Profit Sharing Plan * * * *

F1A692 (emphasis added). See also F1A783-784, 842-843, 901-902, and 979-980 (the relevant 1981, 1983, 1985, and 1987 plan provisions).

In other words, the RIGP defined each participant's PSP Account – for floor-offset purposes – as including not only the *actual* balance in the PSP account but also the *hypothetical* balance which would exist if any previously "cashed-out" funds had remained invested in the PSP. That definitional provision created what Xerox itself has for years referred to as a "phantom account." F1A591. When the PSP Offset is applied to this phantom account it results in a "phantom account offset."

Only in tandem can these two provisions accomplish the phantom offset. The phantom *account* is created by the definition of Retirement Account and consists of the participant's current PSP balance *plus* the hypothetical appreciated value of any prior PSP distribution had it remained in the PSP. The phantom account *offset* is then accomplished by applying the PSP Offset to the phantom account. In other words, the base RIGP monthly benefit would be reduced by the annuitized value of the *phantom* balance in the Retirement Account. See Appendix 4b, Chart #3, "The Pre-1989 Phantom Account Offset" (illustrating the mechanics of the phantom account offset).

As the United States will confirm, this phantom account offset is illegal. Among other violations, it constitutes a forfeiture of accrued benefits prohibited by ERISA. 29 U.S.C. 1053. See *Miller et al. v. Xerox Corporation Retirement Income Guarantee Plan et al.*, 464 F.3d 871 (CA9 2006) (holding that the RIGP

phantom account offset violates ERISA), *cert. denied*, 549 U.S. 1280 (2007).[6]

In this case, however, the Second Circuit assumed (without deciding) that the phantom account offset is permitted by ERISA. Pet. App. 40a n.10 (finding it unnecessary to reach the anti-forfeiture claim under 29 U.S.C. 1053). As explained below, there was no reason for the court to address the legality of the phantom account offset because Xerox admitted during the litigation that it removed the PSP Offset from the 1989 Restatement. And it is *that* offset which applies the phantom account to prior PSP distributions.

C. The 1989 Restatement

In 1989, Xerox made sweeping changes to its benefits architecture. Pet. App. 27a. The PSP was eliminated and the individual accounts contained therein were transferred to the RIGP. *Id.* At the same time, the accrued benefit under the RIGP was substantially redefined. *Id.* Changes to the RIGP were codified in a document called the 1989 Restatement. *Id.*

1. The accrued benefit

The 1989 Restatement changed the method used to determine a participant's accrued benefit. It set forth a "best of five" format. Specifically, participants were now entitled to the largest of: (1) a pension based on a

---

[6] Because it held that the phantom account offset violated 29 U.S.C. 1053, the Ninth Circuit did not need to reach the other arguments raised by plaintiffs in that case.

newly-created Transitional Retirement Account ("TRA"), (2) a pension based on a newly-created Cash Balance Retirement Account ("CBRA"), or (3-5) a pension based on one of three highest-average pay ("HAP") formulas. JA 57a.

The newly-created TRAs were *real* accounts established to receive any holdover PSP account balance of each RIGP participant. JA 33a. Once all PSP account balances were transferred, the TRAs were "frozen," i.e., Xerox stopped making contributions. *Id.*

The newly-created CBRAs were *not* real accounts; they were merely an element of the defined benefit formula. JA 40a. They represented a promise by Xerox to pay an amount to the "account holder" based on a formula which mimics a "defined contribution" that is never actually contributed. Xerox's application of the CBRAs was held, by Judge Richard Posner, to have illegally deprived participants of approximately $300 million in promised benefits. *Berger v. Xerox Corp. Retirement Income Guarantee Plan et al.*, 338 F.3d 755 (CA7 2003). In the words of Judge Posner:

> Xerox argues that its cash balance plan is * * * a "hybrid" * * * * But the only thing that makes it hybrid * * * is that it specifies a lump-sum entitlement that is *not* the prescribed actuarial equivalent of the pension benefit to which the plan entitles employees * * * So for "hybrid" read "unlawful."

Id. at 762 – 763. But, again, this particular illegality is not at issue in this litigation.

In addition to creating the TRAs and CBRAs, the 1989 Restatement also modified the RIGP's existing HAP formulas. As before, the plan included three alternative formulas each based on a participant's average monthly compensation and years of participation. The 1 2/3% figure was lowered to 1.4%, but an extremely significant pre-1989 deduction (*i.e.*, a Social Security offset) was deliberately removed, thereby yielding greater benefits to employees.

2. The treatment of prior distributions

Section 9.6 of the 1989 Restatement retained the generic non-duplication language that existed in the prior plan. But the 1989 Restatement phased-out the PSP Offset beginning in 1990. It is important to understand precisely how this occurred:

The 1989 Restatement went into effect on January 1, 1989. JA 12a. But the transfer of the PSP balances to the TRAs in the RIGP did not occur until December 31, 1989. JA 33a. As such, the 1989 Restatement – for the first time – set forth the RIGP benefit formulas in two *different* sections of the plan: §§4.2 and 4.3. The former applied only to those who retired from Xerox before 1990. JA 26a – 29a. The latter applied to those (like respondents) who retired from Xerox in or after 1990. JA 29a – 31a.

Section 4.2 of the 1989 Restatement *retained* the PSP Offset. JA 26a (deducting from the base RIGP monthly annuity "the monthly amount which would be payable under a Life Annuity which could be purchased with the Member's Retirement Account

* * *").[7] The 1989 Plan also retained the phantom account (in §1.35). JA 19a - 20a. Working together, §§4.2 and 1.35 effected a phantom account offset for all *pre-1990* retirees.

Section 4.3 of the 1989 Restatement, however, *removed* the PSP Offset. JA 29a – 30a (no deduction for a prior PSP distribution). Accordingly, *nowhere* does the 1989 Plan tie the phantom account in §1.35 to the RIGP formulas in §4.3—the section governing the pension entitlement of rehired employees *not yet retired*.

Xerox concedes that the PSP Offset was removed from §4.3. It maintains, however, that the removal was "inadvertent." That is possible. After all, Xerox has spent the past decade of litigation claiming that it would never deliberately treat rehired employees so generously. It is also possible, however, that removal of the offset from §4.3 was an intentional choice. It may have been removed to avoid complex legal and tax concerns articulated by Xerox's advisors. Alternatively, it may have been removed to induce proven talent to rejoin or remain with the company.[8]

---

[7] In pre-1989 RIGP documents, this offset was always contained in §4.2a(ii). In the 1989 Restatement, the offset was retained verbatim. But it is found in *§4.2a(i)* of the document.

[8] Had the offset worked as Xerox has contended in this litigation, hundreds of former Xerox employees would have received no pension (or virtually no pension) for many additional years of service after being rehired. Few skilled employees would accept such a bargain.

Whatever the epistemological difficulty of ascertaining Xerox's "true" intent, respondents' pensions are governed by the *language* in the 1989 Restatement and accompanying SPDs. As explained above, federal law includes several important requirements regarding both the substance and form of such language. And, as the procedural history of this decade-long litigation powerfully illustrates, judicial enforcement of these statutory requirements is essential to the security of defined benefit plans.

D. Procedural History

1. Pre-litigation events

In 1990, Xerox prepared a summary plan description ("SPD") describing the redesigned RIGP. It boasted of how "the 1989 changes in the retirement program * * * have improved the ranking of the Xerox plans" in comparison to "benchmark companies [such as] Kodak, IBM, Digital Equipment, Hewlett-Packard, and AT&T * * * *" JA 45a. As required by ERISA, the SPD was mailed to all plan participants.

Regarding the accrued benefit under §4.3—the section applicable to respondents—the SPD provided that "[t]he amount you receive [from the new RIGP] may * * * be reduced if you had previously left the company and received a distribution at that time." JA 47a. It is undisputed that the SPD said nothing about *how* such reduction would be calculated. Similarly, there was no mention of any actuarial assumptions that could be used to adjust prior distributions to account for the "time value of money."

In 1991, 1992, 1993, and 1994, Xerox provided respondents with SPDs that, in all pertinent respects, were identical to the 1990 SPD. During these same *five years*, Xerox also sent annual *personalized* benefit statements ("Personal Statements") calculating the dollar amount of each recipient's "accrued benefit" that was "100% vested" under the new RIGP. The statement received in 1990 by Paul Frommert is a representative example. It stated:

> If you left the company as of February 28, 1990, with a vested benefit based on your current salary level and years of service, you would be entitled at age 65 to a monthly benefit of $1,281. This benefit will grow as your length of service (up to 30 years) and your earnings increases. *You are 100% vested in this accrued benefit.*

JA 60a (emphasis added).

The monthly benefit calculations in each Personal Statements did not include *any offset* for prior distributions received from the PSP. The Personal Statements did note, however, that "[y]our guarantee may be reduced * * * *by distributions you have already received*."). *Id.* (emphasis added). Like the SPDs provided to respondents during the same period, it is undisputed that these Personal Statements included absolutely nothing to suggest that actuarial assumptions (i.e., interest rates, imputed earnings, etc.) would be used to adjust the recipient's prior distributions to account for the "time value of money." They instead simply told employees precisely what the district court ultimately held herein: that the prior distributions *themselves* would be deducted.

As the Second Circuit observed in 2006, the documents prepared and distributed by Xerox describing the 1989 Restatement led respondents to believe "that their past distributions would only be factored into their benefits calculations by taking into account the amounts *they had actually received*." Pet. App. 47a (emphasis added).

In 1995, Xerox prepared a new SPD that *could* be read to indicate that the company intended to deduct from the RIGP benefit the cash-out amount of prior PSP distributions *plus* "phantom" appreciation. Some respondents contacted Xerox and discovered, to their shock, the dramatic effect that this undisclosed offset would have on the value of the "accrued benefit" that had been described as "100% vested" and *expressed as an actual dollar amount* in the Personal Statements. As Mr. Frommert wrote to Xerox:

> I have recently become aware that [the] numbers in my value added statement do not represent my true retirement benefits. *In fact, in my case, the benefits would be $5.31 per month vs. $2,482.00 as stated in my 1996 value added report* * * * * The news came as a shock since I believed the number in the value added statements year over year.

JA 63a (emphasis added).

Mr. Frommert's is a representative case. Pet. App. 34a ("The experience of plaintiff Paul Frommert demonstrates the manner in which the use of the phantom account was both disclosed and utilized."). In fact, many respondents actually fared worse. JA 142a – 143a. Application of the phantom offset would result

in roughly one-third of the respondents receiving *no pension at all* for their entire post-rehire employment with Xerox. *Id.*[9] And, collectively, application of the phantom account offset (as opposed to the cash-out offset described in the SPDs and Personal Statements) would reduce respondents' pensions by almost $20 million. *Id.*

During the administrative review process that followed, Xerox took the position that the phantom account offset had continuously been in the RIGP since its inception in 1977:

> As an initial matter, you should be aware that there has been no change to the offset mechanism under RIGP. There has been an offset of prior distributions along with hypothetical investment gains attributable to such amount, as though it had remained invested under the plan, going back to inception of RIGP.

JA 65a. In defending this position, the administrator cited and quoted §9.6 – the generic non-duplication provision described above. JA 77a-78a (quoting §9.6 and claiming that "there has never been any intent to provide any duplicate plan benefits where Years of Participation have been restored.").

---

[9] On this chart (prepared by Xerox), the column labeled "No Remedy" represents application of the phantom account offset. Those respondents with a dash in this column would have been left with no pension as a result of Xerox's "interpretation."

Amazed that Xerox could (and would) attempt to apply this phantom offset, respondents internally appealed the administrative determination. In the words of one respondent, Alan Clair, to Xerox:

> I wish to appeal the determination which denies meaningful retirement benefits to me as per Arlyn B. Kaster's letter dated June 23, 1999 * * * * In describing the reasons for the denial, she has missed one overriding fact: I and possibly hundreds of other rehired employees will *never* accrue a meaningful retirement regardless of how hard we work, how much we earn or how long we remain at Xerox!

F1A610.

Once administrative appeals were fully exhausted, respondents retained an attorney to pursue litigation. Pet. App. 76a (noting that all administrative remedies were properly exhausted). In the process, respondents learned that the PSP Offset *had been entirely removed* from §4.3 of the 1989 Restatement.

2. District court (the initial proceedings)

Respondents filed this action in 1999 and challenged the phantom account offset on several grounds. Pet. App. 35a; 74a. Respondents first sought "relief under 29 U.S.C. § 1132(a)(1)(B) based on [the] allegation that Xerox's SPDs inadequately disclosed the phantom account offset, in violation of 29 U.S.C. § 1022." Pet. App. 75a. This legal theory would provide respondents with relief *even if* the governing Xerox Plan clearly included a phantom account offset.

Respondents also "allege[d] that [Xerox] amended the Plan to provide for the phantom account offset, in violation of 29 U.S.C. § 1054(g) * * * and without proper notice under 29 U.S.C. § 1054(h)." *Id.* This claim was predicated on the argument that (i) Xerox removed the phantom offset from its plan in 1989, Pet. App. 82a ("Plaintiffs contend that the 1989 Plan contained no 'phantom account' provision"), and that (ii) Xerox did not restore the phantom offset to the plan until 1998. Pet. App. 84a. This claim was significant to respondents' rights under 29 U.S.C. 1132(a)(1)(B) because respondents maintained that their claims were governed by the 1989 Restatement. Pet. App. 79a.

Finally, respondents alleged that the phantom account was prohibited by 29 U.S.C. 1053 – ERISA's anti-forfeiture provision. Pet. App. 75a. This claim did not require any judicial determination regarding the clarity of the Xerox Plan or the sufficiency of Xerox's disclosures.

In 2004, Xerox "moved for summary judgment dismissing the complaint." Pet. App. 64a. Two respondents "cross-moved for summary judgment [seeking] declaratory and injunctive relief." *Id.* In the eyes of the district court, the relief sought by those two respondents (i.e., an order prohibiting Xerox from continuing to apply the phantom offset) "would seemingly inure to the benefit of all the plaintiffs." *Id.*

In its papers, Xerox argued that the 1998 Restatement of the RIGP should govern respondents' claims because it was the plan in effect when respondents applied for benefits. Xerox relied on the 1998 Restatement for two important reasons: The

1998 Plan, for the first time in nine years, expressly applied a phantom offset to prior PSP distributions. Pet. App. 86a – 87a ("Unlike the 1993 and 1996 Restatements, the 1998 Restatement expressly provided for a phantom account offset for prior distributions * * * from the Retirement Account."). And there was no dispute that the 1998 SPD clearly disclosed the phantom offset. Pet. App. 81a. The district court agreed with Xerox. Pet. App. 92a ("[T]he operative plan here is not the 1989 Restatement of the Plan. Rather, the governing Plan is the one in effect when the relevant decision is or was made * * *").

In the alternative, Xerox argued that it did not matter if the 1989 Restatement governed respondents' claims because, according to Xerox, the phantom offset has been in every version of the plan since its inception, including the 1989 Restatement.

Xerox took this position even while acknowledging that it had omitted "the phantom account principle" from the 1989 Restatement. Pet. App. 84a. It argued that "the 1989 Restatement continued to contain a nonduplicaton-of-benefits provision at §9.6." *Id.* And it introduced voluminous extrinsic evidence to support its claim that the meaning of §9.6 – which permits the offset of "accrued benefits attributable to such [prior] distribution" – should be read to permit a phantom account offset. See, *e.g.*, Pet. App. 83a (discussing the 1983 Restatement and other pre-1989 restatements); 66a – 67a (discussing several 1990 plan amendments); *id.* at 68a (discussing the 1993, 1996, and 1998 Restatements); *id.* at 82a (discussing the 1999 Restatement).

The district court agreed with Xerox. It noted that:

> Plaintiffs may believe that the 1989 Restatement did not provide for such an offset, but it is important to remember here that * * * the administrator's interpretation of the Plan can only be overturned if it is arbitrary and capricious * * * * *Given the history of the Plan*, I do not believe that the administrator's consistent application of the phantom account offset can be said to be arbitrary and capricious.

Pet. App. 85a (emphasis added).

The court granted the motion for summary judgment filed by Xerox. Pet. App. 61a – 98a.

3. 2006 court of appeals (*Frommert I*)

Before the Second Circuit, Xerox defended its position that later amendments to the 1989 Restatement – particularly the 1998 Restatement – applied retroactively to respondents. The Second Circuit disagreed. Pet. App. 37a – 40a; 45a – 49a. It applied well-settled law noting that "a later-adopted plan cannot be applied to reduce already-earned pension benefits [because] these benefits are protected by ERISA's vesting and accrual provisions." Pet. App. 41a (citing 29 U.S.C. 1053-1054). Xerox does not challenge that holding in this Court.

Xerox also defended its position that the non-duplication provision in the 1989 Restatement could be read as authorizing a phantom account offset

notwithstanding the 1989 Restatement's omission of the PSP Offset in §4.3. As the court of appeals noted:

> [D]efendants contend, and the district court agreed, that the phantom account has always been part of the Plan. Despite its absence from the 1989 Restatement, which both the defendants and district court acknowledge, the defendants argued that the Plan contained the phantom account both before and after the 1989 Restatement.

Pet. App. 42a

To be clear, Xerox's litigation position proceeded in two steps: first, Xerox admitted that the relevant provision was "inadvertently" omitted from the 1989 Restatement. Pet. App. 28a – 29a (noting concession "at oral argument, as well as in their submissions to the Court"); Pet. Br. 11 n.3 ("inadvertently omitted").

Then, Xerox maintained that introduction of extrinsic evidence was needed in order to give content to the phrase "attributable to such [prior] distribution" in section 9.6. As the court of appeals noted:

> [D]efendants contend that the phantom account was present in versions of the Plan prior to the 1989 Restatement and that its omission from the 1989 Restatement was rectified by [later amendments]. Further, the defendants argue that because the 1989 Restatement contained a nonduplication provision, its only flaw was that it lacked sufficient details concerning how this

> nonduplication would occur-through the phantom account.

Pet. App. 42a

In reviewing Xerox' proposed interpretation of the 1989 Restatement, the court of appeals in *Frommert I* made several important findings. First, it *accepted* Xerox's contention that §9.6 of the 1989 Restatement could justify *some* offset in this case. Similarly, it accepted Xerox's contention that the 1989 Restatement – due to Xerox's omission of a key term – did not address *how to calculate* that offset. As the United States explained in its petition-stage brief:

> The court of appeals found that, although the Plan has always contained a non-duplication provision stating that benefits will be offset by prior distributions, [citing Pet. App. 26a-28a], until 1998, the Plan did not address *how to calculate* the offset for the distributions received by the plaintiff employees. See *id.* at 28a-29a ("[T]he 1989 Restatement" of the Plan "did not specify how the Plan would account for the prior distributions.").

U.S. Inv. Br. 3.

Next, the court of appeals *rejected* Xerox's contention that §9.6 of the 1989 Plan could be interpreted to authorize a *phantom* offset. In rejecting Xerox's use of extrinsic evidence to fill the confessed gap in the 1989 Restatement, the Second Circuit reviewed Xerox's interpretation of the 1989 Plan under a deferential standard. It concluded:

> It is clear, under either an arbitrary or capricious standard or as a matter of law, that the Plan Administrator's conclusion that the Plan always included the phantom account is unreasonable.

Pet. App. 44a. The extrinsic evidence introduced by Xerox was inconclusive. But, more importantly, there was a major disclosure problem. The court of appeals concluded that "the terms of the phantom account were neither included in the 1989 Restatement nor included in the Plan's SPDs up through 1994 * * *" *Id.* The court also concluded that because of "[t]he prolonged absence of any mention of the phantom account from Plan documents," *id.* at 47a, "rehired employees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received." *Id.*

As a result of these findings, the Second Circuit remanded the case to the district court. In so doing, it suggested that the court "employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." Pet. App. 51a.

4. District court (remand proceedings)

On remand, Xerox filed a "pre-hearing brief addressed to remedies" (A149) alongside an affidavit of Lawrence M. Becker, the administrator (A177-185) and an expert report of Lawerence Sher (A188-199).

The Administrator's Approach. In these three filings, Xerox proposed a new offset method which it

referred to as the Administrator's Approach. A149-176. Xerox described its approach as a "remedial proposal." A151. See also A189 (Mr. Sher writes: "Defendants' counsel asked me to comment on an approach * * * that the plan administrator is proposing to the Court in an Affidavit.").

Xerox did not argue that this approach was the "correct" interpretation of the 1989 Restatement. Nor could it. Xerox continued to take the position – *during the remand proceedings* – that the true interpretation of the 1989 Plan required the use of a phantom account offset. As Mr. Becker wrote to respondents' counsel less than five months *after signing his affidavit*:

> [Y]ou refer to the *Frommert v. Conkright* decision * * * * As you know, the Second Circuit remanded the matter to the * * * District Court for final resolution. Therefore, until final resolution to the contrary, the plan provisions govern. Accordingly, I have concluded that your clients' RIGP benefits are being calculated correctly and according to the terms of the Plan document * * * * *The terms of RIGP specifically provide [for a phantom account offset].*

A1121 (emphasis added).

The fact that Xerox, in the remand litigation, was advocating a gap-filling remedial measure is also made crystal clear by the initial expert report written by Mr. Sher. In that report, Mr. Sher writes:

> The approach taken in the RIGP is [the phantom account offset]. In my opinion, this is

> a logical and equitable approach * * * * However, because the Appeals Court concluded that the methodology was not properly specified under the plan until 1998, *another method must be identified for the pre-1998 years.*

A193 (emphasis added).

Rather than defend the Administrator's Approach as the "correct" interpretation of the 1989 Plan, Xerox merely argued that it was the most *equitable remedy.*[10] To be sure: Xerox did argue that its approach was "consistent with * * * the Plan *as interpreted by the Second Circuit.*" A159-160 (emphasis added). But the primary focus of Xerox's arguments was certainly not to advance the "*best interpretation*" of terms in the 1989 Plan.

The PSP Cash-Out Offset. At the same time that Xerox proposed the Administrator's Approach, respondents proposed two alternative approaches that could be used by the district court to fill the gap left by Xerox in the 1989 Plan. Each of these proposals used, as a starting point, the Second Circuit's interpretation in *Frommert I* of the 1989 Restatement.

As noted above, the *Frommert I* panel accepted Xerox's argument that §9.6 of the 1989 Restatement permitted Xerox to offset some amount attributable to

---

[10] To convince this Court to grant its petition, Xerox blatantly misrepresented its prior litigation position. See, e.g., Reply to Briefs in Opposition 4 (hereinafter "Petition Reply"). This, and many other petition-stage misrepresentations of the record by Xerox, militate heavily in favor of dismissing the writ as improvidently granted.

the PSP distributions previously received by respondents. In so doing, the court relied on the following language: "the accrued benefit of [a rehired] Member * * * shall be offset by the accrued benefit attributable to [his or her prior] distribution." JA 32a.

Although the court of appeals held that §9.6 authorized the use of *some* offset, it had also accepted Xerox's contention that the company had omitted any terms in the 1989 Restatement specifying what "accrued benefit" *is / was* "attributable to [respondents' prior] distribution."

The primary approach urged by respondents therefore adopted the most straightforward reading of the phase "accrued benefit attributable to [the prior] distribution." As explained above, respondents' prior distributions came entirely from the PSP – a defined contribution plan. ERISA explicitly defines a participant's "accrued benefit" in a defined contribution plan as the account balance. 29 U.S.C. 1002(23)(B). Accordingly, the "accrued benefit attributable to [a prior defined contribution plan] distribution" is the cashed-out account – nothing more, nothing less.

This natural reading of §9.6 of the 1989 Restatement is also the understanding that an "average plan participant" would have had of the offset in light of the disclosures provided by Xerox. 29 U.S.C. 1022(a). Put simply, here is what respondents knew:

- They had previously received their cashed-out PSP account balances with no strings attached;

- The SPDs and Personal Statements provided by Xerox respectively stated that their new pensions "*may* * * * be reduced" "by distributions you have already received." JA 47a; JA 60a.

- No document suggested that a "time value of money adjustment" or "actuarial adjustment" would be applied to their prior distribution.

Respondents' Actuarial Approach. As an alternative, respondents proposed a second approach based upon the analysis and testimony of their expert witness, Phillip Cofield. JA 79a – 103a. Under this approach, the phase "accrued benefit attributable to [the prior] distribution" was given the meaning that Mr. Cofield believed a seasoned actuary would use in trying to effectuate the spirit of the non-duplication provision. See *id.* Put simply, Respondents' Actuarial Approach would deduct from the current RIGP annuity (i.e., based on all years of service) the pre-rehire monthly RIGP annuity that was "replaced" by the prior PSP distribution. See Appendix 2b, Chart #1 (Step 5 illustrates how the PSP accrued benefit "replaces" a portion of what would otherwise have been an accrued benefit under the RIGP).

Respondents' Actuarial Approach is unquestionably a *permissible* interpretation of the terms of the 1989 Restatement. It does not comport, however, with what an average plan participant would have expected given the representations made by Xerox for five years. As such, it was not advanced by respondents as their primary approach. Instead, it was proposed in the event that the court accepted Xerox's (erroneous) argument that a defined benefit plan offset *must*

employ actuarial assumptions when addressing prior distributions.

Like the Administrator's Approach, Respondents' Actuarial Approach incorporates actuarial assumptions and, thus, accounts for the "time value of money." Unlike the Administrator's Approach, however, Respondents' Actuarial Approach did not suffer from two fatal flaws: (i) it did not rely on self-serving and undisclosed actuarial assumptions (i.e., it used the assumptions that were actually embedded in the RIGP itself), and (ii) it did not attribute unrelated defined contribution plan assets (i.e., those above the RIGP floor replacement) to the "accrued benefit" under a defined benefit plan.

The New Hire Approach. On July 5, 2006, Xerox filed a "pre-hearing *reply* brief addressed to remedies." A281-301. The vast majority of the brief was devoted to attacking the two offset methods proposed by respondents. In the course of so doing, however, Xerox presented a second remedial proposal. This new litigation position, which Xerox called its New Hire Approach would disregard the prior distribution entirely and treat respondents like other similarly situated employees newly-hired on the same days as they were. A297-299.

Xerox's advocacy of this New Hire Approach cannot possibly be justified by the terms of the 1989 Plan. Consequently, Xerox failed to cite *a single provision* in the 1989 Restatement justifying this fallback litigation position. See A281-301. In fact, Xerox had previously argued (in its *Frommert I* brief) that treating respondents as "new hires" was *expressly foreclosed* by

the terms of the RIGP: Xerox Brief in *Frommert v. Conkright*, 433 F.3d 254 (CA2 2006) 75-76.[11]

The Court's Decision. The district court reviewed all written submissions and conducted two days of hearings. See, *e.g.*, A385-625 (hearing transcripts). The court then held that it would be unreasonable for Xerox to offset any more than the payments that respondents actually received. In so doing, it reasoned as follows:

> Some testimony at the hearing before me focused on the appropriate economic, financial and actuarial methods for treating prior distributions. But this Court is not charged with writing a sound retirement plan. Rather, I must interpret the Plan as written *and consider what a reasonable employee would have understood to be the case concerning the effect of prior distributions. If the employee had no notice of the 'phantom account,' he also had no notice of some of the other mechanisms suggested by witnesses at the remand hearing before me.*

Pet. App. 104a (emphasis added).

---

[11] As explained below, Xerox has now repudiated its New Hire Approach. Pet. Br. 59 (conceding that the plan "tak[es] account of all of the employees' service to Xerox, including service rendered before their rehire date.").

5. 2008 court of appeals (*Frommert II*)

Before the court of appeals for the second time, Xerox shifted its litigation position yet again. Instead of focusing on the Administrator's Approach, Xerox's primary argument to the Second Circuit was that its *New Hire Approach* should be adopted. Appellants' Brief in *Frommert v. Conkright*, 535 F.3d 111 (CA2 2008) 33-35 (hereinafter "Xerox App. Br. in *Frommert II*); *id.* at 36 (advancing the Administrator's Approach as "[a]nother alternative methodology").

Xerox shifted not only its litigation position but also the justification of its newly-preferred New Hire Approach. Instead of relying on an estoppel-like theory (as it had in the district court), Xerox now argued that the New Hire Approach could be justified as a reasonable "interpretation" of the 1989 Restatement based in large part upon Section 1.44(f). Xerox App. Br. in *Frommert II* 32 (CA2 2008) (arguing that "Section 1.44(f) would require that appellees' retirement benefits be calculated without inclusion of their years of prior service."). As the Second Circuit explained, Xerox's "interpretation" of §1.44(f) is untenable. As such, the court easily rejected Xerox's argument. Pet App. 9a. And, as explained below, Xerox has now repudiated its New Hire Approach. Pet. Br. 59.

Of course, Xerox did not abandon the litigation position that it preferred in the district court. Xerox App. Br. in *Frommert II* 36. In the words of Xerox:

> *Another alternative methodology* for the recalculation of benefits was proposed by appellants [i.e., Xerox] , but was not adopted by

> the District Court. It was and is referred to as the Plan Administrator's approach. This approach, like the new hire approach, is based upon a reasonable interpretation of the pre-1998 Plan * * * *

Id. (emphasis added).

Xerox argued that [the] "Court should * * *remand this matter back to the District Court * * *to order a recalculation of benefits based upon one of the two methodologies proposed by [Xerox]." Xerox App. Br. in *Frommert II* 46. The Second Circuit rejected Xerox's arguments and affirmed the district court's selection of the PSP Cash-Out Offset.

SUMMARY OF ARGUMENT

ERISA requires pension promises to be set forth in writing and summarized in a fashion comprehensible to the "average plan participant." To ensure transparency, security, fairness, and efficiency, such was Congress's explicit command.

The outcome sought by Xerox in this case is precisely what ERISA was enacted to prohibit: an undisclosed, unexplained, post-hoc reduction in accrued and vested pension benefits earned over *years* of work. Xerox has attempted – and still attempts, with its Administrator's Approach – to deduct from respondents' pensions an enormous phantom sum, i.e., money that respondents never received.

The irony is that Xerox seeks to deduct an imaginary sum based on an imaginary deal. Neither the 1989 Restatement nor the contemporaneous SPDs

disclose anywhere that respondents would face an offset greater than the one imposed by the lower courts. Totally absent from the *only* plan provision justifying offset—or the disclosures required by ERISA—is a single mention, explanation, or illustration of hypothetical investment gains, interest rates, or any other "assumption" that might be used by Xerox to reduce dramatically respondents' pensions.

Nonetheless, Xerox believes that respondents' pensions should be sacrificed. It advances policy arguments to change the law of deference, claims procedural error, and complains of a "windfall" to employees. Xerox is wrong on every count.

Xerox seeks deference with regard to the very same issue on which its previous position was found to be arbitrary and capricious. No court is *obligated* to extend such "rerun deference." To make matters worse, Xerox's second- and third-bite "interpretations" are nothing more than strategic litigation positions which directly contradict its own actual administrative practice. It impossible to believe that ERISA *mandates* judicial deference to such "interpretations." Put simply, the rule urged by Xerox would severely undermine the fairness and efficiency of benefits administration and discourage the sponsorship of clearly written plans.

As a fallback position, Xerox argues that the Second Circuit erred in failing to examine the offset method selected by the district court under a *de novo* standard of review. This argument is mistaken, but also irrelevant. No standard of review could *possibly* change the outcome of this case. Remand on that basis

will simply prolong a 10-year litigation which has already outlived several of its participants.

Each of Xerox's asserted grounds for reversal is phrased in terms of legal argument. In truth, however, Xerox's real "argument" is nothing more than a misguided view of equity. To be blunt: Xerox appears to be convinced that several federal judges have handed respondents an undeserved "windfall" by prohibiting Xerox from applying an offset which accounts for the time value of money. In taking such a position, however, Xerox ignores basic principles of labor economics.

Put simply, money is fungible. Employees promised greater deferred compensation will accept less in present compensation. Because employers *directly benefit* from promising the former, both in terms of heightened access to skilled employees as well as a reduction in current salary demands, ERISA enforces those agreements. Enforcement confers no "windfall" because such a deal (i) has already benefited the employer and (ii) compensates the employee for the contemporaneous wages foregone in exchange for the promise of deferred compensation (i.e., pension).

ERISA enforces such arrangements because they are economically efficient. The Tax Code subsidizes them because private retirement saving is socially beneficial. Private saving reduces public costs in caring for retirees without adequate private assets. It is also desirable on marginal utility of money grounds because retirees generally have less available wealth than middle-aged workers. Accordingly, reductions in current compensation in exchange for greater deferred compensation are affirmatively encouraged.

When particular terms of a deferred compensation arrangement are communicated to employees—as was done here—equity compels the enforcement *of those terms*. The reason is simple: Employers benefit from their employees' agreement to forgo wages. The extent to which employees are willing to forgo wages depends upon the value of the pension that is promised to them. Thus, ERISA wisely holds the employer to the promise *as reasonably understood by its employees*. Xerox, in essence, confuses a "windfall" with a Congressionally-sanctioned and economically efficient bargain.

We are here because Xerox does not like the terms of the bargain *it communicated*. Put simply, Xerox requests a judicial bailout. The courts below refused. So too should this Court.

ARGUMENT

I. THE SECOND CIRCUIT WAS NOT REQUIRED TO AFFORD DEFERENCE TO XEROX.

Xerox urges upon this Court a change in the law of astonishing magnitude. Specifically, Xerox argues that an ERISA plan administrator's determination must be afforded deference by a reviewing court even if that court has already found that the administrator's prior determination *on the same issue* was an abuse of discretion. As the Second Circuit noted, Xerox "identified no authority in support of the proposition" that such "re-run deference" is required by ERISA. JA 13a. That is hardly surprising. None exists.

Under Xerox's view, a reviewing court is wholly divested of the power to bring closure to litigation in cases where a fiduciary has *grossly* failed in his duty to administer reasonably the plan. If the court believes that an administrator's original—or subsequent—position on an issue is arbitrary and capricious, the court's power is limited to (i) accepting the arbitrary position or (ii) remanding the matter back to the fiduciary for yet another exercise of discretion. Such is a recipe for frequent lawsuits, poorly drafted plans, and litigation that literally outlasts participants. This cannot possibly be required by ERISA, a statute described by its drafters as a "pension bill of rights."

Indeed, the doctrine of administrative deference—upon which Xerox premises its assault on common sense—is nowhere codified in ERISA. Rather, as this Court has noted, it is an important judicial gloss upon the statute. In other words, it is a prudential doctrine intended to aid the smooth but *fair* operation of plans. Accordingly, courts should be – and have been – careful to prevent its abuse particularly when judicially-created deference may conflict with express statutory principles enacted by Congress.

It is hard to imagine a deference-rule with greater potential for abuse that the one urged by Xerox. In order to appreciate this point, the Court need look no further than *this case*:

- For five years, Xerox distributed *personalized* statements that made the following representation:

> If you left the company [this year], you would be entitled at age 65 to a monthly benefit of [$x,xxx]. This benefit will grow [as you work more and as your salary goes up]. You are 100% vested in this accrued benefit." JA 60a.

- For five years, these statements and SPDs included only two brief statements about a potential "offset:"

> Your guarantee may be reduced * * * by distributions you have already received. *Id.*

> The amount you receive may * * * be reduced if you had previously left the company and received a distribution at that time. JA 47a.

- Nonetheless, Xerox tried to apply an undisclosed – and illegal – offset that would save the company approximately $20 million in funding obligations at the expense of respondents. JA 142a – 143a.

- In litigation, Xerox admitted that it had *removed the phantom account offset* from its 1989 Plan.

- Nonetheless, Xerox "arbitrarily and capriciously" attempted to resurrect the removed offset.

- On remand, Xerox advanced two conflicting "interpretations" of the 1989 Plan. Both violate

ERISA. Neither was ever disclosed. One has now been repudiated by Xerox. The other attempts to *again* offset an enormous phantom sum.

- Xerox has now litigated the case long enough to outlive several plaintiffs and their original counsel.

It strains credulity that, under an act designed to make pensions more secure—a court is *required* to defer to an administrator in such circumstances. Yet Xerox urges the creation of precisely such a rule.

A. The Size of the Offset Applicable to Respondents Under the 1989 Restatement Is the Same Issue on Which the Administrator's Previous View Was Found to Be "Arbitrary and Capricious."

Xerox here seeks deference on the same question twice, namely: what offset method does the 1989 Restatement impose? In 2006, the Second Circuit reviewed the answer to that question proposed by Xerox (i.e., a phantom account offset) under a deferential standard. And the court concluded that Xerox's answer constituted an abuse of discretion.

Yet in every filing with this Court, Xerox has maintained that the plan provisions at issue in *Frommert I* were not the same as in *Frommert II*:

> [T]he Plan terms interpreted on remand were *not* identical to those upon which the Plan Administrator made its original benefits determination. The Plan Administrator

> originally construed the Plan in light of the "phantom account" offset provision that the Second Circuit later found was not properly disclosed and added to the Plan until 1998. On remand, the Plan Administrator therefore offered an interpretation of the meaning of the Plan *without* that provision.

Reply to Briefs in Opposition 6-7 (emphasis in original) (citations omitted) (hereinafter "Pet. Cert. Reply Br.").

This claim is simply untrue. It falsely suggests that the court of appeals refused to honor (i.e., struck) a provision from the operative Xerox pension plan and then remanded to the district court for it to interpret the plan without reference to the invalidated provision (i.e., "*without* that provision").

But the Second Circuit did not strike a single word from the 1989 Restatement.[12] It merely accepted Xerox's own admission that *Xerox* had removed the relevant provision (i.e., the PSP Offset). Then it rejected Xerox's attempt to restore the missing offset provision through "interpretation" of §9.6. Nonetheless, Xerox continues:

> To be sure, the text that appears on the printed pages of the Plan document did not change between the Plan Administrator's original interpretation and the interpretation offered on remand from *Frommert I*. In that sense, it is true that the Plan Administrator construed "the

---

[12] That is why Xerox has never identified *what* provision in the 1989 Restatement was allegedly removed by the court.

> same [Plan] terms" on remand that were construed in the original benefits determination. Only on remand, however, was the Plan Administrator on notice that the "phantom account" offset was null and void as applied to Respondents.

Pet. Cert. Reply Br. 7.

To summarize: Xerox admits that remand involved the same issue, the same Plan document, and the same Plan provision (§9.6) that Xerox relied upon to interpret the plan. It claims things are different, however, because only on remand was Xerox informed that its preferred interpretation of the text was 'arbitrary and capricious.'

What Xerox describes is the very definition of "*re*-interpretation."

B. In the Aftermath of an Administrator's Abuse of Discretion, ERISA Does Not Require "Rerun Deference" on the Same Issue.

Unable to credibly deny that it seeks a second bite at the same apple, Xerox asserts nonetheless that its latest positions are owed rerun deference because of this Court's decisions in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) and *Metropolitan Life Insurance Co. v. Glenn*, 128 S.Ct. 2343 (2008). Xerox is wrong.

ERISA is a remedial statute designed to protect employee benefits. It was the expectation of Congress that the protective statute would "draw much of [its]

content from the law of trusts." *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996).

Regarding the bounds of deference owed, black letter trust law is that "[w]here the court finds that there has been [such] an abuse of a discretionary power, the decree to be rendered is in its discretion." George G. Bogert & George T. Bogert, The Law of Trusts & Trustees § 560, at 222 (rev. 2d ed. 1980) (Bogert). *Cf. Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343, 2359 (2008) (Scalia, J., dissenting) (deference not required where trustee has "acted beyond the bounds of a reasonable judgment"). That is precisely what happened here.

Xerox collects scattered authority to argue that, absent bad faith, trust law rigidly *requires* a court to repeatedly defer to the determinations of a trustee vested with discretion. Yet Xerox's doctrinal claim—that trust law imposes an ironclad rule of "rerun deference"—is facially implausible. Trust law is rooted in equity and accordingly sensitive to circumstance. *Cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("the essence of equity jurisdiction" is the power "to mould each decree to the necessities of the particular case."); *Lemon v. Kurtzman* 411 U.S. 192, 201 (1973) ("In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities").

In some cases, rerun deference may have been appropriate; in others not. Xerox would have this Court believe that trust law was so inflexible that it only permitted judges sitting in equity the *sole* option of the former. That is simply not so.

In the wake of discretionary abuse, trust law has for centuries empowered the reviewing court to resolve the dispute itself or remand for further proceedings consistent with particular instructions. Restatement (Second) of Trusts § 187, cmt b ("When the court controls the exercise of a power by the trustee, it may do so by directing him to act or refrain from acting.").

No rigid trust law rule binds a reviewing court to extend endless deference absent bad faith. Unreasonable conduct on the part of the trustee has always been grounds for court intervention unburdened by deference. See generally *id.* § 187 cmts. h and i; 2 Restatement (Third) of Trusts § 50 & cmt. b (2003); 3 Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 187, 187.2, 187.3 (4th ed. 1988) (courts can substitute their own judgment for that of trustee when trustee not "within the bounds of a reasonable judgment").

Although respondents believe that Xerox mischaracterizes the relevant law of trusts, the matter need not be resolved. As this Court has explained:

> Trust law does not tell the entire story. After all, ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection.

Varity Corp. v. Howe, 516 U.S. 489, 497 (1996). Allegedly conflicting lines of authority in the corpus of trust law regarding deference are insufficient to drown the protections of a statute whose expressed purpose is to protect beneficiaries.

Indeed, in enacting ERISA, Congress imposed several limits on benefit plan content and construction that were and are absent from private trust law. See, *e.g.*, 29 U.S.C. 1110 (plan provisions exculpating a fiduciary from liability are void). Such reflected a Congressional determination that employees, for a variety of reasons, were unlikely to be able to negotiate appropriately protective contractual or trust terms governing benefit promises. Were they able to do so, ERISA would be largely unnecessary.

Most pertinently, the statute materially limits the extent to which administrators may construe plan documents:

> [A] fiduciary shall discharge his duties with respect to a plan * * * in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.*

29 U.S.C. 1104(a)(1)(D) (emphasis added). This Court has interpreted the above-quoted language to mean "that trust documents cannot excuse trustees from their duties under ERISA, *and that trust documents must generally be construed in light of ERISA's policies* * * * *" *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568 (1985) (emphasis added).

No salutary goal is served by deferring to the fallback litigation position of an administrator who has already abused its discretion on the very same issue. The appeal of deference in the ERISA setting rests upon the presumption that a fiduciary is qualified to

accurately and efficiently construe and administer its own plan. Here Xerox spent many years defending an interpretation of the 1989 Restatement that was arbitrary and capricious. Xerox's subsequent positions regarding what offset method is permitted by the 1989 Restatement are similarly arbitrary. See *infra* at 63-66. Few administrators have more conclusively refuted the presumption of special expertise and competence.

ERISA's policies are undermined, not served, by mandatory "rerun deference." One of the statute's central aims was to make the pension promise—whether modest or generous—more *transparent*. Among other things, transparency facilitates fair negotiation over the tradeoff between wages and benefits, increases the efficiency of the labor market, and encourages appropriate investment planning on the part of individuals seeking retirement income.

Rerun deference undermines transparency by distorting incentives. Plan sponsors are not rewarded for writing clear documents. Plan administrators are not rewarded for offering clear interpretations when ambiguities present themselves. In practical terms, employers who sponsor clear plans that offer modest benefits are at a substantial competitive disadvantage in the marketplace. Such employers will lose employees to competitors who craft superficially appealing but ambiguous plans. Rerun deference, in essence, creates a race to the bottom.

If rerun deference were *required*, an administrator would have every incentive to always begin with the least generous interpretation of its plan. If it is

rejected as "arbitrary and capricious," the administrator would then proceed seriatim through less favorable interpretations of the plan. The only non-market (i.e., non-reputational) constraint on such behavior is the possibility that a court will find such conduct to constitute "bad faith."

Under the status quo, however, an administrator gets *one guaranteed* crack at an ambiguous issue. If that first position is rejected as unreasonable, an impartial court is free (but not required) to resolve the issue in a way disadvantageous to the employer. As such, employers are encouraged to write clear plans to protect against the possibility of judicial intervention. And to the extent that plan terms are ambiguous, fiduciaries are incented to take reasonable positions so as to capture the benefit of deference.

Of course, rerun deference is most troubling for those in vulnerable positions. It threatens the timely delivery of benefits to elderly beneficiaries—those most in need of the protections afforded by ERISA. Rerun deference prolongs litigation and – as this case illustrates – is likely to deprive retirees of their benefits *for years*. ERISA intended prompt and fair benefit determinations, not litigation for the remainder of a retiree's lifetime.

No court of appeals has articulated a rule of mandatory rerun deference.[13] Nor should this Court.

---

[13] The ERISA cases that Xerox cites in support of remand in the aftermath of an abuse of discretion are cases, unlike this one, in which a new issue "ripens" during litigation. See, e.g., *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1014 (CA9 1997) (remand after

C. Even If ERISA Requires a Court To Grant Rerun Deference, It Surely Does Not Require Deference to Strategic Litigation Positions Which Contradict Administrative Practice.

In seeking deference, Xerox characterizes its Administrator's Approach as an "interpretation" of the 1989 Plan. Yet its proposed "interpretation" openly contradicts the one it continues to take in day to day plan administration. Specifically, Xerox has made clear that it continues to apply the phantom offset to non-plaintiff employees similarly situated to respondents, i.e., those rehired before 1998. A940; A1121. See also *supra* at 33-34.

It is precisely because Xerox's shifting litigation positions in this case *directly conflict* with the position it has taken – and continues to take – in administrative practice that the court of appeals correctly labeled these positions as "the mere *opinion* of the plan administrator." Pet. App. 13a.

Indeed, Xerox has *never* applied either of its proposed litigation "interpretations" in administrative practice. As this Court has recognized in similar circumstances, no rational purpose is served by affording deference to such litigation positions. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988) (this Court has "never applied the principle of [deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or

---

abuse of discretion warranted where there was "a wholly new issue" presented).

administrative practice"); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996) ("The deliberateness of such [litigation] positions, if not indeed their authoritativeness, is suspect."); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("[C]ourts may not accept appellate counsel's post hoc rationalizations for agency" action).

This general principle applies with even greater force in the ERISA context. *Firestone* deference is intimately connected with the requirement that an administrator spell out, as part of the initial administrative review process, the "specific reasons" for its denial. 29 U.S.C. § 1133. See also 29 C.F.R. 2560.503-1(g).

Xerox denies strategic play. Instead, it characterizes its conduct as a mere "mistake." Pet. Br. 38. That is simply untrue: for *years*, it adopted a strategic position regarding the "best" interpretation of the 1989 Restatement in light of its confessed omission of the PSP Offset. Even under a deferential standard of review, that interpretation (i.e., the Phantom Account Approach) was found to be arbitrary and capricious.

The competence rationale for such judicially-created deference rightly dissipates in such a circumstance. This is especially the case where, as here, the administrator *concedes* that his subsequent "alternative" approaches are not his actual beliefs about what the plan says, but merely constitute his normative assessment of what is "equitable."

Xerox deliberately advanced only the phantom account offset as its interpretation of the plan in

Frommert I. It deliberately elected to advance no alternative interpretation in the hopes that it might successfully persuade the court to adopt the phantom offset, thereby awarding respondents no (or virtually no) pension.

That is not a "mistake"—it is a gamble. And it is a gamble that litigants, and their counsel, make every day. Parties are bound to the consequences of their strategic decisions, even if they constitute "mistakes" in retrospect. Xerox strategically elected to argue for virtually no pension benefits to employees in *Frommert I*. Only after it *lost* did it argue, in *Frommert II*, for payment of slightly less trivial benefits pursuant to the Administrator's Approach. Indeed, only when Xerox realized that the district court would likely also reject this approach did Xerox, in its *reply* brief, ask to pay inadequate (but nontrivial) benefits pursuant to its New Hire Approach – which thereafter became its "principal" approach only after *again* losing in the district court. This type of strategic-play is not entitled to judicially-created deference.

D. The Holding Xerox Attributes to the Second Circuit Is Demonstrably False.

In its opening brief, Xerox relies heavily on the consequences that the holding *it attributes* to the Second Circuit would have for plan administrators in litigation under 29 U.S.C. 1132(a)(2) and (a)(3). Pet. Br. 35 (discussing reimbursement and subrogation

enforcement actions);[14] *id.* at 35-36 (discussing lawsuits alleging a breach of fiduciary duty by the plan administrator).[15] This straw man constructed by Xerox is easily exposed.

In *Firestone*, this Court held that courts must defer to reasonable determinations made by ERISA plan administrators when such courts are reviewing lawsuits brought pursuant to 29 U.S.C 1132(a)(1)(B) challenging an administrator's denial of benefits. As the *Firestone* Court made explicit, its opinion did *not* address whether, and to what extent, a court is required to defer to an ERISA plan administrator's determinations in the context of a claim under 29 U.S.C. 1132(a)(2) or (a)(3):

> The discussion which follows is limited to the appropriate standard of review in 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations. We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA.

Firestone, 489 U.S. at 108.

Whether, and to what extent, judicial deference is required in cases brought under 29 U.S.C. 1132(a)(2) and (a)(3) is an extremely important question. And, as this Court recognized in *Firestone*, it must be

---

[14] Such actions – brought by plan fiduciaries – cannot be filed pursuant to 29 U.S.C. 1132(a)(1)(B) which only authorizes "a participant or beneficiary" to bring suit.

[15] Such actions must be brought pursuant to 29 U.S.C. 1132(a)(2) or 29 U.S.C. 1132(a)(3).

addressed in a case that *actually* involves claims brought under one of those provisions.

As in *Firestone*, the only claim at issue here was brought pursuant to 29 U.S.C. 1132(a)(1)(B). In its opening brief, Xerox is quick to emphasize this point. Pet. Br. 13. Thus, the suggestion that the Second Circuit's holding applies to cases involving 29 U.S.C. 1132(a)(2) and (a)(3) is baseless.

II. THE SECOND CIRCUIT PROPERLY APPLIED AN ABUSE OF DISCRETION STANDARD IN AFFIRMING THE DISTRICT COURT.

On page 53 of their 62 page brief, Xerox offers an alternative basis for reversal: that the Second Circuit erred in reviewing the district court under an abuse of discretion standard. Xerox's argument is predicated on mischaracterization of what was actually being reviewed by the court of appeals.

A. In 2006, the Second Circuit Interpreted the 1989 Plan and Concluded That Its Plain Text Permitted a Range of Offset Methods.

Extending deference to Xerox, the *Frommert I* panel held that the 1989 Restatement permitted Xerox to offset *some* amount against respondents' post-rehire pensions. The court based its conclusion on §9.6 of the 1989 Restatement which authorized an offset equal to the "accrued benefit attributable to the [prior] distribution" of benefits. JA 32a.

The *Frommert I* panel also concluded, however, that the generic language in §9.6 of the 1989

Restatement did *not* permit Xerox to "attribute" amounts to respondents' prior distributions that were inconsistent with an average plan participant's expectations in light of five years of anemic SPD disclosures. In concluding that Xerox's imposition of the phantom offset was arbitrary and capricious, the court of appeals noted:

> The prolonged absence of any mention of the phantom account from Plan documents, most notably SPDs, likely, and quite reasonably, led plan participants to believe that it was not a component of the Plan. *Rather rehired employees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received.*

Pet. App. 47a (emphasis added). Furthermore, the court of appeals concluded that:

> Without the benefit of such information [i.e., that Xerox intended to apply an offset in an amount significantly greater than the monies *actually received*], former employees contemplating returning to Xerox were denied the opportunity to make a meaningful decision regarding whether they would accept the terms of Xerox's pension plan * * * * Such belated disclosure of so significant a change cannot be squared with ERISA's mandate.

Pet. App. 37a.

As such, it remanded the case to the district court to "employ equitable principles when determining the

appropriate calculation." *Id.* The point of the remand was procedural fairness in light of an ambiguous instrument, namely, to give both sides the opportunity to present compelling argument and relevant extrinsic evidence regarding the intersection of the 1989 Restatement, the SPDs, and the offset expectation of an average plan participant given the circumstances of this case. Only then could the court fairly adjudge the expectations of an average plan participant and fashion a remedial offset matching those expectations.

B. The District Court Selected an Appropriate Offset Method.

On remand, the district court held two days of hearings in which in heard testimony from, among others, two respondents it believed were representative of the group. See, *e.g.*, A385-625 (hearing transcripts). The court also reviewed extensive written submissions from both sides, including affidavits and expert reports.

The court held that it would be unreasonable for Xerox to offset any more than the payments that respondents actually received. In so doing, the court reasoned as follows:

> Some testimony at the hearing before me focused on the appropriate economic, financial and actuarial methods for treating prior distributions. But this Court is not charged with writing a sound retirement plan. Rather, I must interpret the Plan as written *and consider what a reasonable employee would have understood to be the case concerning the effect of prior distributions. If the employee had*

> *no notice of the 'phantom account,' he also had no notice of some of the other mechanisms suggested by witnesses at the remand hearing before me.*

Pet. App. 104a (emphasis added).

C. Applying the Correct Standard of Review, the Second Circuit Affirmed the District Court.

The Second Circuit affirmed the district court's choice of offset. In its decision, the *Frommert II* panel reiterated the fact that the *Frommert I* panel had *already* "construed and applied" the relevant terms of the 1989 Plan. Pet. App. 8a. And it reiterated the fact that the selection of an offset method was a matter of judicial discretion. Pet. App. 13a. This was so, the court of appeals explained, because (i) Xerox had violated ERISA by improperly amending its plan without sufficient notice to respondents and (ii) the *operative* plan (i.e., the 1989 Plan) addresses respondents' circumstances "with what can only be described as ambiguity, contradiction or silence." *Id.*

In reviewing the district court's exercise of discretion, the Second Circuit applied the correct standard. When parties seek to give meaning to truly ambiguous written terms with reference to extrinsic evidence, judicial discretion is appropriate, and the standard of review in such cases is abuse of discretion. See, *e.g.*, *In re Navigation Technology Corp.*, 880 F.2d 1491, 1495 (CA1 1989) (abuse of discretion review regarding meaning of ambiguous contract); *Brewer v. Muscle Shoals Board of Education*, 790 F.2d 1515, 1519 (CA11 1986); *Restaurant Operators, Inc. v.*

Jenney, 128 N.H. 708, 710, (N.H. 1986) (clearly erroneous standard). In addition, where, as here, the court is constructing a remedy in the aftermath of a statutory violation, discretion is appropriate. See, *e.g.*, *Downie v. Independent Drivers Ass'n Pension Plan*, 934 F.2d 1168, 1170 (CA10 1991) (abuse of discretion review regarding constructing of ERISA remedy).

Ultimately, the difficulty with Xerox's argument is that the Second Circuit had *already* interpreted the relevant plan documents. Simply put: no new purely interpretative task was left for the court of appeals in *Frommert II*. At issue was whether the judicial discretion needed to remediate the gap in the plan was exercised permissibly by the district court. The court of appeals held it was.

III. EVEN IF THE CHOICE OF OFFSET METHOD SHOULD HAVE BEEN REVIEWED *DE NOVO*, THE JUDGMENT MUST BE AFFIRMED.

Even if the Second Circuit applied the incorrect standard in reviewing the district court, any error was harmless. The offset method selected by the district court was the most reasonable interpretation of the 1989 Restatement. And, in any event, Xerox's litigation-inspired offset proposals are indefensible. Because remand will not change the result of this case, the Second Circuit's judgment must be affirmed.

A. The Offset Method Selected by the District Court Is the Best Approach.

The PSP Cash-Out Offset adopted by the district court is the most straightforward reading of the phase "accrued benefit attributable to [the prior] distribution" in the 1989 Restatement.

Respondents' prior distributions came entirely from the PSP – a defined contribution plan. And ERISA defines a participant's "accrued benefit" in a defined contribution plan as the account balance. 29 U.S.C. 1002(23)(B). Thus, the "accrued benefit attributable to [a prior defined contribution plan] distribution" is the cashed-out account – nothing more, nothing less.

This natural reading of §9.6 of the 1989 Restatement is also the understanding that an "average plan participant" would have had of the offset in light of the disclosures provided by Xerox—which never mentioned *anything* about interest, time value of money, or actuarial assumptions.

B. Xerox Has Repudiated the New Hire Approach.

In its opening brief, Xerox has abandoned its New Hire Approach. Pet. Br. 59 (conceding that the plan "tak[es] account of all of the employees' service to Xerox, including service rendered before their rehire date."). This is not surprising. It was indefensible for three independent reasons.

First, it is based on an untenable construction of the 1989 Restatement. It purports to rely on 1.44(f)

which provides: "No credit shall be given for any period with respect to which a lump sum payment has been made under Section 8.5 and 8.8." JA 25a. But respondents' lump sum payments were made pursuant to §8.2 of the plan. As such, the Second Circuit easily rejected Xerox's argument. Pet App. 9a.

Second, it is foreclosed by 29 U.S.C. 1022 because of the contrary representations made by Xerox in its SPDs. JA 48a (representing that "[t]he term service, as used in the formula, basically includes all your years of employment with Xerox up to a maximum of 30 years" and listing exceptions none of which apply to respondents).

Finally, it is expressly prohibited by ERISA's buyback rules. 29 U.S.C. 1054(b)(1), (d)(1), and (e). It is undisputed that the Xerox plan did not give rehired employees the right to "buy-back" into the plan by repaying prior distributions plus statutory interest. JA 92a. Of course, Xerox was not *required* to include such a buy-back right. JA 115a. But, because Xerox chose not to include such a right, the RIGP was required to use all years of service when calculating the defined benefit of rehired employees. Xerox conceded as much before the court of appeals when it argued that:

> [Plaintiffs] * * * now contend that the "new hire" methodology should not be adopted because the Plan does not contain a "buy back" provision. The issue is a red herring. The District Court is ordering a remedy for a violation of ERISA, not designing an ERISA plan. Thus, the District Court does not have to

> comply with all of ERISA's other statutory provisions.

Appellants' Reply Brief in *Frommert v. Conkright*, 535 F.3d 111 (CA2 2008) 16.

C. The Administrator's Approach Is Indefensible.

The Administrator's Approach is vastly more complicated than his New Hire Approach, but similarly indefensible. First, it *again* resurrects the illegal phantom account offset – this time for the post-1998 period of service. JA 142a – 143a. Second, it relies on a host of complex assumptions which are loosely based on scattered provisions in the 1989 Restatement none of which is tied, in any way, to *PSP distributions*. As Xerox's own expert admitted, small differences in assumptions can have major effects. But yet again, Xerox unsurprisingly chooses aggressive assumptions (e.g., interest rates) when many alternatives exist (e.g., the considerably lower interest rates referenced in the statutory buy-back provision which Xerox chose to ignore).

Most importantly, however, the Administrator's Approach is indefensible because it suffers from the same disclosure problem as the phantom account. Put simply, the SPDs made no mention of *any* actuarial assumptions that would be applied to a participant's past distributions. In the exact same way that the SPDs failed to disclose the phantom account offset, they failed to disclose the offset resulting from application of the Administrator's Approach.

Indeed, it would be truly miraculous if the SPDs did disclose sufficient information to "reasonably apprise" respondents of the complicated details and actuarial assumptions of the Administrator's Approach in *any* way, let alone "in a manner calculated to be understood by the average plan participant." 29 U.S.C. 1022. The reason, of course, is that before 2007, Xerox never used or intended to use the Administrator's Approach. So how could it have disclosed the terms of such an offset in the early 1990s? There is no way that a post-hoc litigation position developed in response to an appellate court's 2006 decision could possibly have been disclosed in SPDs from over *fifteen years earlier*.

The offset method selected by the district court is the most reasonable choice given the circumstances of this case. It should be applied.

CONCLUSION

The judgment should be affirmed.

Respectfully Submitted,

Peter K. Stris
Counsel of Record
3333 Harbor Blvd.
Costa Mesa, CA 92626
(714) 444-4141, ext. 215
peter.stris@strismaher.com

Brendan S. Maher
Stris & Maher LLP
1920 Abrams Pkwy., #430
Dallas, TX 75214
(214) 224-0091

Shaun P. Martin
University of San Diego
School of Law
5998 Alcalá Park
San Diego, CA 92110
(619) 260-2347

John A. Strain
Law Offices of John A. Strain
321 12th Street, Suite 101
Manhattan Beach, CA 90266
(310) 802-1300

Counsel for Respondents

APPENDIX

APPENDIX
Fold-Out Exhibits

Chart #1: A Typical Floor-Offset Arrangement

Chart #2: Respondents' Pre-1989 Distributions

Chart #3: The Pre-1989 Phantom Account Offset

(See next 3 pages)

Chart #1: A Typical Floor-Offset Arrangement

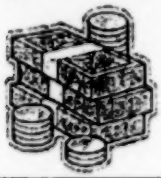
Step #1: Calculate an employee's base monthly annuity using the formulas contained in the defined benefit plan

- Apply the defined benefit plan formulas which typically involve years of service and compensation. → DB plan monthly annuity

Step #2: Take the employee's individual account balance.

- The picture to the left represents the actual balance in the employee's defined contribution

Step #3: Convert the account balance into a monthly annuity using specified assumptions.



→ DC plan monthly annuity

Step #4: Compare the two annuities

From Step #1

DB plan monthly annuity

From Step #3

Step #5: Determine source of distributions

"Accrued benefit" under DB plan. Xerox calls this a "top-up."

"Accrued benefit" under the DC plan

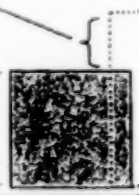


Chart #2: Respondents' Pre-1989 Distributions

Step #1: Calculate the base RIGP monthly benefit

- Add 5 highest years compensation
- Divide by 60 (= monthly average)
- Multiply by 1 2/3%
- Multiply by # of years worked

→ Base RIGP monthly annuity

Step #2: Take the *actual* amount of the PSP account.

- The picture to the left represents the actual balance of the employee's PSP account.

Step #3: Convert the *actual* PSP balance into a monthly benefit using assumptions from PSP contracts.

→ PSP monthly annuity

Step #4: Compare the monthly benefits

From Step #3

From Step #1

Base RIGP monthly annuity

Step #5: Determine source of distributions

There is no "accrued benefit" under the RIGP

"Accrued benefit" under the PSP

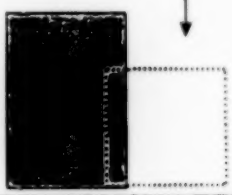


Chart #3: The Pre-1989 Phantom Account Offset

Step #1: Calculate the base RIGP monthly benefit

- Add 5 highest years compensation
- Divide by 60 (= monthly average)
- Multiply by 1.2/3%
- Multiply by # of years worked

→ Base RIGP monthly annuity

Step #2: Take the *actual* amount of the PSP account.

- The account balance is $0; the PSP was already distributed.

Step #2a: Add the *hypothetical* balance of the PSP account as if the prior distribution had remained with Xerox.

- The picture to the left represents the *hypothetical* (i.e., phantom) balance of the employee's PSP account.

Step #3: Convert *hypothetical* PSP balance into a *hypothetical* monthly benefit using assumptions from PSP contracts.

Step #4: Compare the monthly benefits

From Step #3

From Step #1

Base RIGP monthly annuity

Step #5: Determine source of distributions

There is no "accrued benefit" under the RIGP. There is nothing to "top-up."

There is no PSP "accrued benefit." The *actual* account balance is $0.

REPLY BRIEF

148

(20)

No. 08-810

8731

Supreme Court, U.S.
FILED
DEC 14 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR THE PETITIONERS

IVY THOMAS MCKINNEY
MICHAEL D. RYAN
XEROX CORPORATION
45 Glover Avenue
Norwalk, CT 06856

MARGARET A. CLEMENS
LITTLER MENDELSON
160 LINDEN OAKS
SUITE C
ROCHESTER, NY 14525

ROBERT A. LONG, JR.
ROBERT D. WICK
Counsel of Record
RICHARD C. SHEA
ROBERT S. NEWMAN
JONATHAN L. MARCUS
CHRISTIAN J. PISTILLI
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Petitioners

December 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 5A9X7Q

TABLE OF CONTENTS

Page

I. THE PLAN ADMINISTRATOR'S INTERPRETATION OF THE PRE-AMENDMENT PLAN TERMS IS ENTITLED TO DEFERENCE 1

A. The Plan Administrator Did Not Interpret The Same Plan Terms On Remand. 2

B. Respondents' Proposed "Same Plan Terms" Exception To *Firestone* Deference Lacks Merit. 5

1. Trust Law Supports *Firestone* Deference 6

2. ERISA's Objectives Support *Firestone* Deference 9

C. Respondents' Proposed "Litigation Position" Exception To *Firestone* Deference Lacks Merit. 12

II. ABSENT DEFERENCE TO THE PLAN ADMINISTRATOR, THE DISTRICT COURT'S DECISION SHOULD HAVE BEEN REVIEWED *DE NOVO*. 14

A. The Court Of Appeals Should Not Have Deferred To The District Court's Plan Interpretation. 15

B. The District Court Did Not Rely On Extrinsic Evidence In Interpreting The Plan. 19

C. The District Court's Interpretation Of The Plan Cannot Be Sustained Under *De Novo* Review 20

III. THE PLAN ADMINISTRATOR'S INTERPRETATION IS CONSISTENT WITH ERISA'S DISCLOSURE REQUIREMENTS. 25

A. The "Actuarial Equivalence" Offset Is Significantly Different From The Reconstructed Account Methodology 26

B. Disclosure Issues Do Not Support Affirmance. 28

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Alessi v. *Raybestos-Manhattan, Inc.*,
451 U.S. 504 (1981) 26

Auer v. *Robbins*,
519 U.S. 452 (1997) 13

Berry v. *Ciba-Geigy Corp.*,
761 F.2d 1003 (4th Cir. 1985) 9

Blessing v. *Freestone*,
520 U.S. 329 (1997) 25

Carrabba v. *Randalls Food Markets, Inc.*,
145 F. Supp. 2d 763 (N.D. Tex. 2000)..... 17

Central States, Southeast & Southwest Areas Pension Fund v. *Central Transport, Inc.*, 472 U.S. 559 (1985)..... 1

City of Clinton v. *Moffitt*,
812 F.2d 341 (7th Cir. 1987) 18

Colton v. *Colton*
127 U.S. 300 (1888) 7

Eaton v. *Eaton*,
132 A. 10 (1926) 6, 8

Firestone Tire & Rubber Co. v. *Bruch*,
489 U.S. 101 (1989) ..... *passim*

Gridley v. *Cleveland Pneumatic Co.*, 924 F.2d 1310 (3d Cir. 1991) 25

Herrmann v. *Cencom Cable Associates, Inc.*, 978 F.2d 978 (7th Cir. 1992) 29

Jensen v. *SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994) 28-29

Kress v. *Food Employers Labor Relations Association*, 391 F.3d 563 (4th Cir. 2004) 29

Marrs v. *Motorola, Inc.*, 577 F.3d 783 (7th Cir. 2009) 11

McCarthy v. *Dun & Bradstreet Corp.*, 482 F.3d 184 (2d Cir. 2007) 29

Mello v. *Sara Lee Corp.*, 431 F.3d 440 (5th Cir. 2005) 25

Mers v. *Marriott International Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014 (7th Cir. 1998) 28

Metropolitan Life Insurance Co. v. *Glenn* 128 S. Ct. 2343, 2351 (2008) ..... *passim*

Otten v. *Stonewall Insurance Co.*, 511 F.2d 143 (8th Cir. 1975) 18

Pompano v. *Michael Schiavone & Sons, Inc.*, 680 F.2d 911 (2d Cir. 1982) 29-30

Ross v. *Rail Car America Group Disability Income Plan*, 285 F.3d 735 (8th Cir. 2002) 17

Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) 13

Stahl v. *Tony's Building Materials, Inc.*, 875 F.2d 1404 (9th Cir. 1989) 29

Stamper v. *Total Petroleum, Inc. Retirement Plan*, 188 F.3d 1233 (10th Cir. 1999) 29, 30

White v. *Sundstrand Corp.*, 256 F.3d 580 (7th Cir. 2001) 24

STATE CASES

Bodine v. *Webb*, 992 S.W.2d 672 (Tex. App. 1999) 17

Gardner v. *O'Loughlin*, 84 A. 935 (N.H. 1912) 8

Schofield v. *Commerce Trust Co.*, 319 S.W.2d 275 (Mo. Ct. App. 1958) 8

Stallard v. *Johnson*, 116 P.2d 965 (Okla. 1941) 8

State v. *Rubion*, 308 S.W.2d 4 (Tex. 1958) 7

Woodward v. *Dain* 85 A. 660 (Me. 1913) 8

FEDERAL STATUTES AND REGULATIONS

29 U.S.C. 1104(a)(1) 11

29 U.S.C. § 1002(23) 21-22

29 U.S.C. § 1022 25

29 U.S.C. § 1054(c)(3) 25

29 U.S.C. § 1132(a)(1)(B) 16, 17

29 U.S.C. § 1132(a)(3) 17

29 U.S.C. § 1132(e)(1) 17

26 C.F.R. § 1.401(a)(4)-8(d)(1)(i) 27

29 C.F.R. § 2520.102-3(*l*) 29-30

MISCELLANEOUS

3 W. Fratcher & M. Ascher, Scott and Ascher on Trusts (5th ed. 2007) 6, 7, 8

11 S. Williston & R. Lord, A Treatise on the Law of Contracts (4th ed. 1999) 18

G. Bogert & G. Bogert, The Law of Trusts and Trustees (2d ed. rev. 1980) 7

H.R. Conf. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038 17

REPLY BRIEF OF PETITIONERS

The court of appeals erred by refusing to defer to the Plan Administrator's interpretation of the Plan on remand, and then erred again by deferring to the district court's interpretation. Under either *Firestone*'s deferential standard or a *de novo* standard of review, the Plan Administrator's interpretation is superior to the district court's interpretation because it better comports with the terms of the Plan, it recognizes the time value of money, and it avoids unfair windfalls. As the Government acknowledges, it is also the way ERISA plans typically calculate offsets.

I. THE PLAN ADMINISTRATOR'S INTERPRETATION OF THE PRE-AMENDMENT PLAN TERMS IS ENTITLED TO DEFERENCE.

The court of appeals held that the Plan Administrator's interpretation of the Plan does not deserve *Firestone* deference because it is a "mere opinion" rather than a formal "decision." Pet. App. 13a. Petitioners' opening brief explains that there is no basis for limiting *Firestone* deference in this way. *See* Pet. Br. 32-36. In *Firestone*, this Court looked to "the terms of the trust" as the basis for according deference to the plan administrator. *See Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989); *see also Cent. States, Se. & Sw. Areas Pension Fund* v. *Cent. Transp., Inc.*, 472 U.S. 559, 568 (1985) (deferring based on plan terms). Here, the Plan confers broad interpretive authority on the Plan Administrator. *See* Pet. App. 142a. Restricting

Firestone deference despite such plan language would have far-reaching consequences, because plan administrators are called upon to interpret plans in a wide variety of contexts other than formal benefit determinations. *See* Pet. Br. 34-36.

Neither Respondents nor the Government argue that *Firestone* deference is limited to formal benefit determinations. Instead, they argue that *Firestone*'s deferential standard of review does not apply when a plan administrator re-interprets the "same" plan terms, or interprets a plan in the course of litigation. The arguments for these proposed exceptions to *Firestone* deference, like the proposed exception for conflicts of interest rejected in *Glenn*, are unpersuasive.

A. The Plan Administrator Did Not Interpret The Same Plan Terms On Remand.

Respondents and the Government argue that on remand from *Frommert I*, the Plan Administrator interpreted the same plan terms a second time. *See* U.S. Br. 24; Resp. Br. 46. That is not correct. The Plan Administrator construed different Plan terms on remand because the court of appeals rejected the Plan Administrator's original reliance on post-1989 amendments to the Plan.

The Plan Administrator originally calculated Respondents' benefits under the terms of the Plan in effect at the time Respondents retired, not the terms

in effect at the time they were re-hired.[1] As a result, Respondents' benefits were calculated under the 1996 and later versions of the Plan that included specific language requiring a reconstructed account offset – language that was absent from the 1989 version.[2]

Although the district court upheld the Plan Administrator's reliance on these post-1989 versions of the Plan, *see* Pet. App. 92a, the court of appeals reversed, reasoning that applying post-1989 Plan amendments to Respondents would violate ERISA's "anti-cutback" provision. *See id.* at 39a-40a, 50a. The court of appeals remanded for a recalculation of Respondents' benefits under "pre-amendment" Plan terms, *i.e.*, under the terms of the 1989 Plan. *Id.* at 51a. Thus, only on remand did the Plan Administrator interpret the 1989 Plan.

According to Respondents, Petitioners argued in *Frommert I* that the 1989 Plan terms standing alone required a reconstructed account offset. Resp. Br. 28. That is not what Petitioners argued. Petitioners acknowledged that the reconstructed account offset was accidentally omitted from the Plan in 1989, but

---

[1] *See* J.A. 76a; Pet. App. 80a-82a; Pet. C.A. Br. in *Frommert I*, at 18-19.

[2] *Compare Frommert I* App. A-1354-55, A-1410 (relevant portions of the 1998 and 1999 Plan Restatements), *with* J.A. 6a-42a (1989 Restatement excerpts). *See also* J.A. 76a-77a (applying the 1998 Restatement); *Frommert I* App. A-1548-657 (applying 1996 and later versions of the Plan); Resp. Br. 27-28 (acknowledging Petitioners' reliance on the 1998 Restatement).

noted that it was quickly re-inserted by a 1990 amendment and otherwise was present throughout the Plan's entire history. *See* Pet. C.A. *Frommert I* Br. 29-31, 34-35. Petitioners therefore argued that the inadvertent omission of reconstructed account language for a four-month period in 1990 did not require the Plan Administrator to calculate Respondents' benefits under the terms of the 1989 Plan. *See* Pet. App. 42a.[3] As the court of appeals recognized, this argument expressly relied on the 1990 amendment that re-inserted reconstructed account language into the Plan. *See id.* (Petitioners argued that the absence of a reconstructed account offset from the 1989 Plan "was rectified by the changes made to the Plan in 1990"); *id.* (Petitioners argued that the omission "was quickly rectified by changes to the Plan"); *id.* at 29a (Petitioners relied on "a series of subsequently issued changes and clarifications" to the Plan).[4]

Petitioners did not argue that either the non-duplication of benefits provision or any other provision of the 1989 Plan required a reconstructed

---

[3] Because the 1989 Plan Restatement took effect (in relevant part) in January 1990, the language at issue was absent only from January through April 1990. *See* Pet. Br. 8 n.1, 11-12 & n.3.

[4] Read in light of these statements in *Frommert I*, the passing statement in *Frommert II* that the Plan Administrator had previously considered "the same terms" appears to mean only that the 1989 Plan terms – along with the pre-1989 and post-1989 Plan terms – were *part* of the plan language that was before the Plan Administrator in the original benefits determinations.

account offset. Petitioners briefly referred to the non-duplication provision, but only for the limited proposition that the Plan was not intended to provide duplicate benefits. *See, e.g.*, J.A. 77a-78a. Indeed, Petitioners expressly acknowledged that there is no requirement in the non-duplication of benefits provision that duplicate benefits be eliminated "through the [reconstructed] account." Pet App. 42a.

On remand, the Plan Administrator therefore addressed a newly-framed question for the first time: how Respondents' benefits should be calculated under the 1989 Plan standing alone.

B. Respondents' Proposed "Same Plan Terms" Exception To *Firestone* Deference Lacks Merit.

The court of appeals found that the Plan Administrator made a mistake of law by calculating Respondents' benefits under post-1989 amendments to the Plan. That mistake does not justify applying a different standard of review to the Plan Administrator's interpretation of the correct set of plan terms on remand. The Plan grants the Plan Administrator broad authority to construe plan documents, and does not withdraw that authority if the Plan Administrator makes a mistake. *See* Pet. Br. 7. Respondents fail to identify a valid basis for overriding express Plan provisions granting this authority to the Plan Administrator.

1. Trust Law Supports *Firestone* Deference.

Contrary to the Government's assertion, *see* U.S. Br. 15-19, trust law supports according *Firestone* deference to the Plan Administrator's interpretation, whether or not it is regarded as an interpretation of the "same plan terms." In the absence of bad faith, dishonesty or the like, deference ordinarily would be due to the trustee "since that is what the [trust instrument] requires." *Eaton* v. *Eaton*, 132 A. 10, 11 (1926); *see* Pet. Br. 39-46; 3 W. Fratcher & M. Ascher, Scott and Ascher on Trusts § 18.2.1, at 1348-49 (5th ed. 2007). A mistake of law does not override this deference because, in the absence of bad faith or dishonesty, the settlor presumably would continue to *want* the trustee to exercise the discretion conferred by the terms of the trust.

Here, Respondents and the Government do not accuse the Plan Administrator of having acted in bad faith. Instead they argue that trust law permits a court to "control" a trustee who commits an abuse of discretion. Resp. Br. 50; U.S. Br. 15. The question raised by this case, however, is not *whether* courts exercise such control, but *how* they do so, *i.e.*, what are the appropriate "[m]ethods of [c]ontrol." Scott and Ascher on Trusts § 18.2.1, at 1347. Absent bad faith, the appropriate method of control is to delineate the boundaries of the trustee's discretion, but to permit the trustee to exercise discretion within those bounds. Pet. Br. 39-46.

The Government essentially argues that trust law imposes no standards whatsoever regarding the

appropriate methods of control. It cites a treatise that identifies three possible courses of action when a court finds that a trustee has abused its discretion: (i) the court may order the trustee to make a "new decision . . . in the light of rules expounded by the court," without "instruct[ing] him as to the specific action which he should take"; or (ii) "[s]ometimes" it may go further by "stating the exact result it desires to achieve"; or (iii) it may "fix[] some limits on the trustee's action and giv[e] him leeway within those limits." G. Bogert & G. Bogert, The Law of Trusts and Trustees § 560, at 222-23 (2d ed. rev. 1980). That observation is true as far as it goes, but Petitioners have identified a more specific trust law principle, clearly articulated in the Scott treatise, governing *why* courts make one decision or the other. Under that principle, in the absence of bad faith or dishonesty, a mistake of law in construing a trust will not divest the trustee of the discretion conferred by the trust instrument. *See* Scott and Ascher on Trusts § 18.2.1, at 1348-49.[5]

The Government also cites cases establishing that a court may order a trustee to do at least the minimum necessary to avoid an abuse of discretion.

---

[5] Contrary to the Government's assertions, *Colton* v. *Colton* recognizes this principle. *See* 127 U.S. 300, 321-22 (directing the lower court to order a specific payment after reasoning that "the trust must not . . . be defeated" because the trustee fails to exercise his discretion "honestly, and in good faith"); Scott and Ascher on Trusts § 18.2.1, at 1348 & n.3 (citing *Colton* as an example of the bad faith rule). Similarly, *State* v. *Rubion*, 308 S.W.2d 4, 11 (Tex. 1958), discussed by the Government, relies on Scott.

See, e.g., *Schofield* v. *Commerce Trust Co.*, 319 S.W.2d 275, 277 (Mo. Ct. App. 1958) ("if [a trustee] is directed to pay as much of the income and principal as is necessary for the support of a beneficiary he can be compelled to pay *at least the minimum amount* which in the opinion of a reasonable man would be necessary" (emphasis added) (quoting Scott on Trusts § 187, at 1375 (2d ed. 1956))); *Stallard* v. *Johnson*, 116 P.2d 965, 967 (Okla. 1941) (order "directed the trustee to do merely that which he should have done under the directions given him by his testator"); *accord Eaton*, 132 A. at 11 ("The court . . . may find *the least amount that a reasonable judgment would allow*, and order payment accordingly." (emphasis added)).[6] These cases support the proposition that where, as here, the terms of the trust do not limit the trustee to a single course of action, it is the trustee's role to choose among the permissible alternatives.

The Government attempts to distinguish the cases cited by Petitioners on the ground that the trustee in those cases had a "mistaken belief that he lack[ed] th[e] discretion" to make the payment at issue. U.S. Br. 18. The cases, however, do not rely on any such distinction. Moreover, if this *ad hoc* distinction were to be drawn, it would favor

---

[6] *See also Woodward* v. *Dain* 85 A. 660, 661 (Me. 1913) (court properly ordered trustee to pay beneficiary "*not less* than $20 a month, which sum is *adjudged to be actually necessary* for her support" (emphases added)); *Gardner* v. *O'Loughlin*, 84 A. 935, 936 (N.H. 1912) (approving order of specific sum because it "must be assumed the condition of the beneficiary seemed to require" it).

Petitioners: the Plan's administrators had a mistaken belief that they were required to apply post-1989 Plan amendments to Respondents, and thus had no alternative but to apply a reconstructed account offset. This mistake of law, having been corrected, provides no basis for concluding that the Plan Administrator is incapable of construing the Plan honestly and fairly going forward.

In sum, the weight of trust law authority assesses whether there is "reason to believe that the trustee will fail to act fairly" going forward, U.S. Br. 18, by focusing on whether the trustee has acted in bad faith. Pet. Br. 39-46. Indeed, the district court *upheld* the Plan Administrator's original decision to apply post-1989 Plan amendments to Respondents. Pet. App. 92a. That decision can hardly be viewed as an act of bad faith.

2. ERISA's Objectives Support *Firestone* Deference.

Firestone deference furthers important objectives of ERISA. It promotes uniformity of plan interpretation, avoids unpredictable financial consequences, and allows employers to assign primary responsibility for interpreting ERISA plans to "those whose experience is daily and continual," rather than to "judges whose exposure is episodic and occasional." *Berry* v. *Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1985); *see* Pet. Br. 28-32, 47-49; *see also* ERISA Indus. Comm. & Am. Benefits Counsel Amici Br. 7-12; Business Roundtable *et al.* Amici Br. 26-34. This case illustrates the dangers of departing from these principles: the courts below

adopted an economically nonsensical interpretation of the Plan under which employees earn larger benefits by *leaving* Xerox for a period of years than they earn if they stay with the company without interruption.

Respondents do not deny that *Firestone* deference furthers important ERISA objectives, but they nevertheless argue for an exception to *Firestone* deference when the plan administrator makes a mistake.

This argument is contrary to *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008). *Glenn* expressly rejected "special procedural or evidentiary rules" for stripping away *Firestone* deference. *Id.* at 2351. The Court thus held that a plan administrator who acts under a conflict of interest in interpreting a plan is still entitled to deference. *See id.* at 2350-52. While a conflict of interest may be considered as a "factor" in reviewing for an abuse of discretion, it does not justify "a change in the *standard* of review, say, from deferential to *de novo*." *Id.* at 2350.

A "same plan terms" exception to *Firestone* deference would be precisely the kind of "special procedural or evidentiary rule" that the Court rejected in *Glenn*. Under *Glenn*, the fact that a plan administrator had a previous opportunity to construe the same plan terms is at most a "factor" to consider in applying a deferential standard of review; it is not grounds for "a change in the *standard* of review." *Id.*

Respondents and the Government speculate that, without a "same plan terms" exception to *Firestone* deference, plan administrators will take "a

potentially unlimited number of bites at the interpretation apple," will deliberately adopt interpretations "that unreasonably disfavor[] beneficiaries," and will "proceed seriatim through less favorable interpretations of the plan." U.S. Br. 20-21; Resp. Br. 53. But these concerns do not arise where, as here, the plan administrator originally focused on an incorrect set of plan terms due to a mistake of law. In such cases, the plan administrator is entitled to at least *one* opportunity to construe the correct plan terms once those terms are identified.

In any event, the parade of horribles conjured up by Respondents is overblown. It rests on the implausible premise that employers will deliberately set out to mistreat their own work force. *See Marrs* v. *Motorola, Inc.*, 577 F.3d 783, 787 (7th Cir. 2009) (noting that employers have strong countervailing incentives). It also assumes that plan administrators will be willing to violate their fiduciary duties. *See* 29 U.S.C. § 1104(a)(1). In addition, it ignores the fact that courts have long administered the law of trusts without a "same trust terms" exception to deferential review, yet have had no apparent difficulty with trustees seeking "unlimited bites at the interpretation apple."

Respondents likewise ignore ample judicial safeguards against the type of misconduct they discuss: *Firestone* deference may be denied altogether if a plan administrator acts in bad faith, and short of that, a plan administrator's prior interpretations of a plan may (if appropriate) be considered as a "factor" under *Glenn*. Respondents nowhere explain why taking such conduct into

account as a "factor" would be insufficient. If the type of misconduct imagined by Respondents were actually to occur, it could be treated as "important (perhaps of great importance)" under *Glenn*. 128 S. Ct. at 2351.

Respondents' speculation about a threat to "the timely delivery of benefits" is also unpersuasive. Resp. Br. 53. This case illustrates why. On remand from *Frommert I*, the question was not whether there would or would not be further interpretation of the Plan; further interpretation was inevitable. The question instead was whether this additional interpretation would proceed with or without *Firestone* deference. Thus, despite the fact that the lower courts denied *Firestone* deference on remand, the district court still held a hearing; it still considered briefs and arguments from the parties; and it still had to arrive at an interpretation of the Plan. While the denial of *Firestone* deference impacted the *accuracy* of the interpretation reached on remand, it did not prolong the *time* required to reach that interpretation. Indeed, *Firestone* deference might actually have *shortened* the proceedings below by providing a clear basis on which to choose among competing interpretations.

C. Respondents' Proposed "Litigation Position" Exception To *Firestone* Deference Lacks Merit.

Respondents (but not the Government) argue that the Plan Administrator's interpretation of the Plan on remand deserves no deference because it is a "litigation position." Resp. Br. 54-56. An exception to

Firestone deference for interpretations offered in litigation, like a "same plan terms" exception, would be inconsistent with *Glenn*. The fact that an interpretation is offered in litigation may be grounds for inferring a conflict of interest, but *Glenn* holds that a conflict of interest is at most a factor to consider in reviewing for abuse of discretion; it is not a basis for applying a different standard of review. *See Glenn*, 128 S. Ct. at 2351.

Respondents' contrary argument confuses interpretations adopted by plan administrators with interpretations put forward by counsel. Respondents correctly note that the litigation positions of counsel receive no deference under administrative law, but that does not imply that the "fair and considered" views of plan administrators deserve no deference. *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997). The fact that it was "litigation which disclosed the need" for a plan administrator's interpretation makes no difference to its validity. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996); *see also* Pet. Br. 49 n.17.

Here, the Plan Administrator first offered an interpretation of the 1989 Plan terms on remand from *Frommert I*. *See supra* at 2-5. This "actuarial equivalence" interpretation was the only interpretation of the 1989 Plan that was identified as the Plan Administrator's interpretation, and it was the only interpretation for which Petitioners sought *Firestone* deference. While Petitioners also advanced an alternative "new hire" approach, Petitioners did not present this approach as the Plan Administrator's interpretation or claim that it was

entitled to *Firestone* deference. Petitioners suggested this alternative because certain Respondents themselves claimed that they expected to be treated like newly-hired employees when Xerox re-hired them. *See* J.A. 64a, 118a.

Respondents fare no better in arguing that the Plan Administrator has not attempted to apply his interpretation during the pendency of this litigation. Especially in light of the rejection of that interpretation in *Frommert II*, Petitioners reasonably may wait for the conclusion of the litigation to apply that interpretation in practice.

II. ABSENT DEFERENCE TO THE PLAN ADMINISTRATOR, THE DISTRICT COURT'S DECISION SHOULD HAVE BEEN REVIEWED *DE NOVO*.

The court of appeals reviewed the district court's interpretation of the Plan on remand under a deferential "allowable discretion" standard and upheld that interpretation as "one reasonable approach among several reasonable alternatives." Pet. App. 13a-14a. That was error. As the Government acknowledges, in the absence of *Firestone* deference, "de novo review applies to plan interpretation even if an appellate court is reviewing a district court's remedial decision." U.S. Br. 27.

Having agreed with Petitioners on this key point, the Government largely avoids the question of whether the court of appeals applied the correct standard of review, arguing instead that the ultimate *result* reached in the courts below is correct in light of ERISA's disclosure requirements. *See* U.S.

Br. 28-30. These disclosure arguments are erroneous, and they stray beyond the questions on which this Court granted review. *See infra* at 28-31. To the extent that the Government and Respondents actually address the question presented – whether the court of appeals applied the correct standard of review – their arguments lack merit for the reasons set forth below.

A. The Court Of Appeals Should Not Have Deferred To The District Court's Plan Interpretation.

The Government originally argued that deferential review of the district court's interpretation of the Plan was justified "because the Plan was silent about how to calculate the offset for the prior distributions." U.S. Br. in Opposition to Cert. 13; *see also id.* at 9, 18. Now, in the face of Petitioners' demonstration that the Plan is *not* silent regarding the offset, *see* Pet. Br. 16, 51-52, 59-60, the Government abandons that contention and retreats to an assertion that "the Plan did not address the offset issue with sufficient clarity." U.S. Br. 29. In the absence of "sufficient clarity," the Government argues, the district court was free to use "equitable principles" to fashion an "equitable remedy." *Id.* at 27-28. This argument fails for several reasons.

First, the district court and the court of appeals both recognized that the task on remand was one of plan interpretation. In *Frommert I*, the court of appeals remanded for a recalculation of Respondents' benefits under the "pre-amendment" terms of the Plan. Pet. App. 51a. The district court, in turn,

understood its task on remand as one of "interpret[ing] the Plan as written." *Id.* at 104a; *see also id.* ("The Court's task, as directed by the Court of Appeals, is simply to determine, based on the language of the Plan and the SPD, what benefits are now due this group of rehired employees."). Finally, in *Frommert II*, the court of appeals observed that the district court "explicitly" "utilize[d] pre-1998 Plan terms" as the basis for its nominal offset approach, "but simply applied those terms to [Respondents] differently than [Petitioners] proposed." *Id.* at 9a.[7]

Moreover, the court of appeals dismissed Respondents' claim for equitable relief under ERISA § 502(a)(3) and directed the district court to proceed under § 502(a)(1)(B), a provision that applies only to claims for benefits due "under the terms of [the] plan." 29 U.S.C. § 1132(a)(1)(B). The court dismissed Respondents' claim for equitable relief because it held that the relief Respondents are seeking "falls comfortably within the scope of § 502(a)(1)(B)." Pet. App. 53a. The Government asserts that § 502(a)(1)(B) extends beyond claims based on plan

---

[7] Respondents assert that Petitioners "blatantly misrepresented [their] prior litigation position" because, according to Respondents, Petitioners defended the Plan Administrator's approach in the proceedings below not as an interpretation of the Plan but "merely" as "the most equitable remedy." Resp. Br. 34 & n.10. To the contrary, Petitioners' briefs below make clear that the task on remand was one of plan interpretation. *E.g.*, *Frommert II* App. A-284 ("[P]laintiffs are claiming benefits under the terms of the Plan, and interpretation of the Plan terms is therefore required. The party charged with and responsible for that task is the Plan Administrator." (citation omitted)).

terms, U.S. Br. 30, but that argument – which was neither made nor considered in the courts below – is incorrect.[8]

Second, when properly construed, the terms of the Plan *do* speak with "sufficient clarity" to permit "a precise calculation of benefits." U.S. Br. 28, 30. As Petitioners showed in their opening brief, the terms of the 1989 Plan are best read to require a standard actuarial equivalence offset for prior distributions. *See* Pet. Br. 59-60; *see also infra* at 20-21 & n.10. Tellingly, the Government does not deny that this interpretation is superior to the district court's interpretation as a textual matter. Indeed, the Government never even addresses the relevant terms of the Plan. The court of appeals likewise failed to address whether an actuarial equivalence

---

[8] Although § 502(a)(1)(B), by its terms, authorizes only claims for benefits due under "the terms of [the] plan," 29 U.S.C. § 1132(a)(1)(B), the Government argues that it also applies to claims asserted under the provisions of ERISA. U.S. Br. 30. If that is what Congress had intended, it would have provided that § 502(a)(1)(B) applies to claims asserted under "any provision of [ERISA] *or* the terms of the plan" – language it used elsewhere in the very same section of ERISA. 29 U.S.C. § 1132(a)(3). Congress deliberately limited § 502(a)(1)(B) to claims asserted under "the terms of the plan" to prevent state courts from interpreting or enforcing ERISA provisions under their § 502(a)(1)(B) jurisdiction. *See* 29 U.S.C. § 1132(e)(1); H.R. Conf. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107. Courts have therefore held that statutory claims cannot be asserted under § 502(a)(1)(B). *See, e.g., Ross* v. *Rail Car Am. Group Disability Income Plan*, 285 F.3d 735, 741 (8th Cir. 2002); *Carrabba* v. *Randalls Food Markets, Inc.*, 145 F. Supp. 2d 763, 770 (N.D. Tex. 2000), *aff'd* 252 F.3d 721 (5th Cir. 2001); *Bodine* v. *Webb*, 992 S.W.2d 672, 677 (Tex. App. 1999).

interpretation is superior to the district court's interpretation. Instead, it improperly deferred to the district court's interpretation as a permissible exercise of "allowable discretion." Pet. App. 8a.

Third, the Government's attempt to fashion a malleable "sufficient clarity" exception to *de novo* review is not supported by precedent. As noted above, the Government no longer argues that the Plan is "silent" as opposed to "ambiguous." *See* U.S. Br. 29 ("[W]hether the Plan is ... silent or ambiguous is beside the point."). Under settled law, however, interpretations of written instruments are reviewed *de novo* even when the written instrument is ambiguous.[9] The law contains no "sufficient clarity" exception to that principle. Nor does the Government suggest any reliable basis on which a court could distinguish between written instruments that are "merely" ambiguous and those that are "sufficiently" ambiguous to justify abandoning *de novo* review.

Finally, a "sufficient clarity" exception to *de novo* review would wreak havoc on the administration of ERISA plans. In any instance in which a plan failed to address an issue with "sufficient clarity" to satisfy

---

[9] *See* 11 S. Williston & R. Lord, A Treatise on the Law of Contracts § 30:7, at 91-92 (4th ed. 1999) (interpretation of an ambiguous contract is a question of law in the absence of relevant and disputed extrinsic evidence); *City of Clinton* v. *Moffitt*, 812 F.2d 341, 344 (7th Cir. 1987) (same); *Otten* v. *Stonewall Ins. Co.*, 511 F.2d 143, 147 (8th Cir. 1975) (same). As explained in Part II.B, *infra*, the district court did not rely on extrinsic evidence in interpreting the Plan on remand.

a court, district courts would have "allowable discretion" to adopt conflicting interpretations of the very same plan, destroying the uniformity and consistency that is indispensable to the operation of ERISA plans. *See* Pet. Br. 30-31; Chief Actuaries Amici Br. 9 (if "different district courts are permitted to give different meanings to the same benefit provision in a single plan, actuaries cannot perform their core responsibilities" under ERISA).

B. The District Court Did Not Rely On Extrinsic Evidence In Interpreting The Plan.

Respondents (but not the Government) argue that deference to the district court was appropriate because the district court made findings of fact based on "extrinsic evidence" regarding the reasonable expectations of plan participants. Resp. Br. 60-61. Respondents are mistaken. The district court did not consider extrinsic evidence on the question of a participant's reasonable expectations. *See Frommert II* App. A-402-03 (indicating that witness testimony would not illuminate this "objective" question and observing that plaintiffs' counsel "could put on 50 clients and they all may say 50 different things"). Nor did the district court make findings of fact on that question. As the court of appeals observed in *Frommert II*, "we did not anticipate . . . extensive fact finding, and none occurred on remand." Pet. App. 12a. No deference was due to the district court on the basis of findings of fact that were not made and extrinsic evidence that was not considered.

C. The District Court's Interpretation Of The Plan Cannot Be Sustained Under *De Novo* Review.

The most natural reading of the text of the 1989 Plan is that it provides for a standard actuarial equivalence offset for prior distributions. *See* Pet. Br. 59-60. This reading also avoids the irrational results that follow from the district court's nominal offset interpretation. *Id.* at 60-61. Respondents nonetheless attempt to defend the nominal offset interpretation under a *de novo* standard of review, calling it "the most reasonable" interpretation of the 1989 Plan. Resp. Br. 62-63. These arguments are unconvincing.

1. The most straightforward reading of the 1989 Plan is that it provides for an actuarial equivalence offset. The Plan's non-duplication of benefits provision requires that the benefits payable to rehired employees must be offset by "the *accrued benefit* attributable to [the prior] distribution." Pet. App. 141a (emphasis added). The Plan defines the term "accrued benefit," in pertinent part, as a monthly retirement annuity "computed in accordance with Section . . . 4.3." *Id.* at 134a. The relevant portion of Section 4.3 – Section 4.3(e) – states that the monthly retirement annuity attributable to a participant's defined contribution account is the annuity that the account would purchase "using annuity rates established by the PBGC."[10] *Id.* at 141. The 1989 Plan is therefore best

---

[10] Section 4.3(e) is the relevant provision in Section 4.3 because it is the provision that deals with the conversion of "Transitional Retirement Accounts" into equivalent annuities.

understood as providing that a prior distribution from a participant's defined contribution account must be offset by converting the distribution into a monthly annuity "using annuity rates established by the PBGC." *Id.*

Respondents offer no direct criticism of this interpretation as a textual matter, but they do offer a brief textual defense of the district court's nominal offset approach. Their argument suffers from two incurable flaws.

First, Respondents rely on the wrong definition of "accrued benefit." Respondents correctly recognize that under the non-duplication of benefits provision, their benefits must be offset by the "accrued benefit attributable to" their prior distributions. Pet. App. 141a; Resp. Br. 63. They then look to the ERISA definition of "accrued benefit" under a defined contribution plan, which states that a participant's accrued benefit is the balance in the participant's account. *See* 29 U.S.C. § 1002(23)(B). Relying on this definition, Respondents argue that their benefits should be offset only by the nominal account

---

Pet. App. 141a. Respondents' initial distributions consisted of a distribution of the balance in their "Retirement Accounts," which Respondents refer to as PSP accounts. Resp. Br. 12. These "Retirement Accounts" were renamed "Transitional Retirement Accounts" in the 1989 Restatement. Pet. Br. 8 & n.1. As the district court observed, references in the Plan to "Transitional Retirement Accounts" are reasonably understood to refer to these accounts under their prior name "Retirement Accounts" as well. *See* Pet. App. 86a.

balances that they were paid after their initial departure from Xerox. Resp. Br. 63.

The question here, however, is how to calculate an offset under the Plan's defined benefit formula, not its defined contribution formula. *See* Pet. Br. 9-10. Consistent with the ERISA requirements pertaining to defined benefit plans, *see* 29 U.S.C. § 1002(23)(A), the Plan defines a participant's "accrued benefit" as an annuity beginning on a participant's normal retirement date. Pet. App. 134a. Respondents therefore err in asserting that the "accrued benefit attributable to" their prior distributions is the nominal account balance. Instead, under the relevant Plan terms, the accrued benefit attributable to the prior distributions is calculated by converting those distributions into equivalent retirement annuities using standard PBGC conversion factors. *See supra* at 20-21. As the Government recognizes, this is how ERISA plans "typically" calculate offsets for prior distributions. U.S. Br. 26 n.7.

Second, Respondents ignore the fact that it is not logically possible to offset a lump sum amount against a monthly annuity. Respondents' prior distributions consisted of lump sum payments. *See* Pet. Br. 12. The Plan's guaranteed floor benefit, by contrast, consists of a monthly retirement annuity. *Id.* at 8. Thus, as Respondents effectively acknowledge in the chart appended to their brief, *some* conversion of their prior distributions into annuity form must be made in order to calculate the necessary offset. *See* Resp. Br. 2b-3b (noting at step three that floor-offset plans perform offset

calculations by converting defined contribution account balances into equivalent annuities).

Respondents implicitly argue that this conversion should be done using two different sets of conversion factors. Specifically, under Respondents' nominal offset approach, one set of factors – a *zero* interest rate and a *zero* mortality rate – applies between the date of their original distributions and the date of their ultimate retirement. At retirement age, however, Respondents apply a different set of conversion factors – a standard interest and mortality rate – to convert their prior distributions into equivalent annuities.

This schizophrenic approach is both counterintuitive and irrational. *See* Chief Actuaries Amici Br. 12-14. Indeed, even Respondents' own expert rejected it as unfair. Pet. Br. 15, 61. For these reasons, as well, the nominal offset approach is not the "most reasonable interpretation" of the Plan.

2. Respondents' argument is not improved by their assertion that the district court's nominal offset approach is the only approach consistent with their "reasonable expectations." Employees cannot reasonably expect to receive larger benefits if they leave Xerox and then return than if their service to the company is uninterrupted. But that is precisely what occurs under the nominal offset approach. *See* Pet. Br. 14-15. Nor can employees reasonably expect the Plan to treat a dollar paid twenty years ago as if it has the same value as a dollar paid today. But that, too, is what happens under the nominal offset approach. *Id.*; Chief Actuaries Amici Br. 11-13. The

end result is that re-hired employees receive a large measure of double credit for their initial period of service. *See* Pet. Br. 61.[11] Try as they might, neither Respondents nor the Government can make sense of this economically nonsensical interpretation of the Plan.[12]

At bottom, Respondents' reasonable expectations argument does not seek benefits allegedly due Respondents under the terms of the Plan; instead, it seeks the benefits Respondents say they expected based on allegedly defective benefit statements. *E.g.*, Resp. Br. 35-36, 43. But Respondents' alleged expectations cannot trump the text of the Plan

---

[11] Respondent Clair candidly admitted that he had no such unreasonable expectation. *See* Pet. Br. 61. The Government's citation to *subsequent* testimony in which Mr. Clair attempted to recant his earlier affidavit, U.S. Br. 32, is unpersuasive.

[12] The Government speculates that an employer might *want* to confer windfalls on re-hired employees in order to entice skilled workers to return. U.S. Br. 32-33. If that were an employer's goal, there are far less destructive means of achieving it than adopting a pension plan that treats career employees like "suckers" and that rewards employees only if they leave the company and then return after a disruption of their service. *White* v. *Sundstrand Corp.*, 256 F.3d 580, 584 (7th Cir. 2001) (noting that employers are unlikely to "want a pension plan that rewards employees for quitting"). The Government also asserts that the Plan Administrator's actuarial equivalence offset treats re-hired employees worse than newly-hired employees. U.S. Br. 33. That is not correct. Comparing employees with the same number of years of service, and taking account of all their benefit distributions, offsetting only by the actuarial equivalent of a prior distribution *cannot* leave re-hired employees worse off than newly-hired employees, because an actuarial equivalence offset merely reduces an employee's benefit by the actual value of the prior distribution.

unless, among other things, Respondents can demonstrate on a participant-by-participant basis that they actually relied to their detriment on misleading statements by the Plan. *See, e.g.*, *Mello* v. *Sara Lee Corp.*, 431 F.3d 440, 445-48 (5th Cir. 2005); *Gridley* v. *Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir. 1991) (Alito, J.). Respondents made no such showings below, and the district court made no such factual findings. *See supra* at 19.

III. THE PLAN ADMINISTRATOR'S INTERPRETATION IS CONSISTENT WITH ERISA'S DISCLOSURE REQUIREMENTS.

Respondents and the Government invite the Court to decide whether the Plan Administrator's interpretation satisfies ERISA's disclosure requirements. *See* 29 U.S.C. § 1022. That question was not decided by the court of appeals and is not among the questions on which this Court granted review. Accordingly, this Court should not consider it. *See Blessing* v. *Freestone*, 520 U.S. 329, 340 n.3 (1997). In any event, the Plan Administrator's interpretation is consistent with ERISA's disclosure requirements.[13]

---

[13] The Government also asserts in passing that even a properly-disclosed reconstructed account offset would be illegal because it would reduce a participant's "accrued benefit" in an impermissible manner. *See* U.S. Br. 25-26 (citing 29 U.S.C. § 1054(c)(3)). The Second Circuit held that the reconstructed account offset "may permissibly be applied to" employees after it was properly disclosed in 1998, *see* Pet App. 51a, and Respondents have not challenged that aspect of the decision.

A. The "Actuarial Equivalence" Offset Is Significantly Different From The Reconstructed Account Methodology.

Respondents and the Government suggest that the Plan Administrator's "actuarial equivalence" approach scarcely differs from the reconstructed account offset that the Second Circuit struck down as inadequately disclosed. *See* U.S. Br. 6; Resp. Br. 65. In actuality, the two approaches are markedly different.

The reconstructed account methodology calculates an offset based on "hypothetical growth in a nonexistent account." Pet. App. 50a. Specifically, benefits are offset based on the growth that would have occurred in a hypothetical profit sharing account if Respondents had left their benefits in the Xerox profit sharing plan after their initial departure from the company. *Id.* Because the profit sharing plan experienced extraordinarily high rates of return in the 1990s, the reconstructed account offset led to "large" offsets for these particular rehired employees. *See id.*

Nor is the Government's assertion correct. In *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), this Court held that a participant's statutory "accrued benefit" under a plan is the amount remaining *after* any plan-specified offsets are taken into account. Thus, a plan-specified offset – such as the reconstructed account offset – cannot result in a forfeiture of "accrued benefits" because the offset is part of the formula used to calculate "accrued benefits" in the first instance. *See id.* at 511-12.

The Plan Administrator's approach, in contrast, does not use hypothetical accounts or hypothetical investment gains to calculate an offset. Instead it uses "the amounts [Respondents] had actually received" after their initial departure. Resp. Br. 32. Because these amounts were received in lump sum form, they must be converted into annuity form before they can be offset against the annuity floor benefit guaranteed by the Plan. *See* Pet. Br. 6. The Plan Administrator's approach therefore converts the amounts that Respondents "actually received" into equivalent annuities using standard PBGC actuarial equivalence factors. Pet. App. 150a-53a. As the Government concedes, this is how plans "typically" calculate such offsets. U.S. Br. 26 n.7. It is also a preferred approach under the applicable Treasury Regulations. 26 C.F.R. § 1.401(a)(4)-8(d)(1)(i).

Furthermore, it is not unusual or a cause for concern for participants in a floor-offset plan to receive no benefit from the defined benefit component of the plan. Floor-offset plans use defined benefit formulas as a kind of insurance policy, to ensure a minimum level of benefits in case the defined contribution component of the plan performs poorly. *See* Pet. Br. 5. When the defined contribution component performs well, "many [employees] will have little or no benefit from the defined benefit plan." Employee Benefit Research Institute, *Hybrid Retirement Plans: The Retirement Income System Continues to Evolve*, EBRI Special Report SR-32, at 18 (1996), *at* http://www.ebri.org/pdf/briefspdf/0396ib.pdf.

B. Disclosure Issues Do Not Support Affirmance.

In *Frommert I*, the court of appeals found that the reconstructed account offset was inadequately disclosed in the Xerox Summary Plan Description ("SPD"). The Government argues that the same disclosure issues also foreclose the Plan Administrator's "actuarial equivalence" interpretation, *see* U.S. Br. 29-30, but the court of appeals did not adopt this conclusion. To the contrary, the court of appeals concluded that the nominal offset methodology is but "one . . . among several" permissible approaches, Pet. App. 13a-14a, which belies any suggestion that the nominal offset approach was the *only* permissible outcome given Xerox's disclosures.

The Government's argument also fails on the merits. The Government does not contend – nor could it – that the SPD promised Respondents that only a nominal offset would be applied. The SPD simply informed Respondents that their benefits were subject to an offset for prior distributions; it did not specify that a nominal offset would be applied. *See* J.A. 47. Accordingly, this is not a case in which the terms of the SPD are inconsistent with the terms of the Plan. *See Mers* v. *Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1023 (7th Cir. 1998) (requiring "a direct conflict between the SPD and the underlying policy" in order for the SPD to control); *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994) (explaining that the plan will control "when the plan document is

specific and the SPD is silent on a particular matter").

Furthermore, the Government's suggestion that a standard actuarial equivalence conversion must be specifically disclosed in an SPD is incorrect. By definition, a Summary Plan Document is a *summary* of the principal provisions of a plan. While such summaries must "identify[] circumstances which may result in . . . offset . . . of any benefits," 29 C.F.R. § 2520.102-3(*l*), they need not disclose the actuarial factors used to calculate the offset. *See McCarthy* v. *Dun & Bradstreet Corp.*, 482 F.3d 184, 197 (2d Cir. 2007) (ERISA does not "impose[] a blanket requirement under which a Summary Plan Description invariably must describe the method of calculating an actuarial reduction."); *Stamper* v. *Total Petroleum, Inc. Ret. Plan*, 188 F.3d 1233, 1243 (10th Cir. 1999) ("While the SPD may be silent on the actuarial reduction assumptions of 'deferred severance benefits,' it in no way contradicts the Plan regarding these benefits. As such, the Plan must control."). Especially when such details affect only a small percentage of plan participants – such as the re-hired employees at issue in this case – "[l]arding the summary" with this technical "minutiae" would "defeat that document's function." *Herrmann* v. *Cencom Cable Assocs., Inc.*, 978 F.2d 978, 983-984 (7th Cir. 1992).[14]

---

[14] *See also, e.g., Kress* v. *Food Employers Labor Relations Ass'n*, 391 F.3d 563, 568 (4th Cir. 2004); *Stahl* v. *Tony's Bldg. Materials, Inc.*, 875 F.2d 1404, 1409 (9th Cir. 1989); *Pompano* v.

Here, it is undisputed that the SPD disclosed the "circumstances which may result in offset[s]." 29 C.F.R. § 2520.102-3(*l*); *see* J.A. 47a. Moreover, since a prior lump sum payment *must* be converted into an annuity before it can be offset against the Plan's annuity floor benefit, it is not at all surprising for the conversion to be performed in the "typical" way, *see* U.S. Br 26 n.7, using standard PBGC conversion factors. By contrast, the same cannot be said of the unusual features of the reconstructed account offset. The heightened disclosure concerns raised by the reconstructed account offset therefore do not apply to the standard offset approach proposed on remand.

Any other conclusion could jeopardize large numbers of pension plans. Pension plans contain numerous actuarial calculations, conversions and reductions that apply to particular participants in particular circumstances, but SPDs often do not discuss such calculations other than to identify the circumstances in which they may occur. *See, e.g.*, *Stamper*, 188 F.3d at 1243. Accordingly, if this Court were to delve into SPD disclosure issues without an adequate record, it would risk invalidating scores of pension plans across the country.

Finally, if the Government were correct that plan administrators may not rely on interpretations of ambiguous plan language that are not disclosed in an SPD, *Firestone* deference would be seriously eroded. Rarely if ever will an interpretation of

---

Michael Schiavone & Sons, Inc., 680 F.2d 911, 914 (2d Cir. 1982).

ambiguous plan language be explicitly disclosed in an SPD. Thus, in the only cases in which *Firestone* deference matters – cases involving ambiguous plan language – the Government's approach would result in *de novo* review "of the lion's share of ERISA plan claims denials," 128 S. Ct. at 2350, a result that *Glenn* rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

IVY THOMAS MCKINNEY
MICHAEL D. RYAN
XEROX CORPORATION
45 Glover Avenue
Norwalk, CT 06856

MARGARET A. CLEMENS
LITTLER MENDELSON
160 LINDEN OAKS
SUITE C
ROCHESTER, NY 14525

ROBERT A. LONG, JR.
ROBERT D. WICK
Counsel of Record
RICHARD C. SHEA
ROBERT S. NEWMAN
JONATHAN L. MARCUS
CHRISTIAN J. PISTILLI
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Petitioners

December 2009

SUPPLEMENTAL BRIEF

130

(8)

No. 08-810

Supreme Court, U.S.
FILED
JUN 8 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET AL.,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

MICHAEL D. RYAN
XEROX CORPORATION
45 Glover Avenue
Norwalk, CT 06856

MARGARET A. CLEMENS
NIXON PEABODY LLP
Clinton Square
P.O. Box 31051
Rochester, NY 14603

ROBERT D. WICK
Counsel of Record
RICHARD C. SHEA
JONATHAN L. MARCUS
CHRISTIAN J. PISTILLI
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Petitioners

June 2009

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

SUPPLEMENTAL BRIEF 1

I. REVIEW SHOULD BE GRANTED ON THE FIRST QUESTION. 1

A. Trust Law Mandates Deference To The Plan Administrator. 3

B. The Decision Below Was Not Premised On The Fact That The Plan Administrator Interpreted The "Same Terms" On Remand. 8

C. The Plan Is Not "Silent" Regarding The Offset 9

II. REVIEW SHOULD BE GRANTED ON THE SECOND QUESTION. 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Canseco v. *Construction Laborers Pension Trust*, 93 F.3d 600 (9th Cir. 1996) 7

Colton v. *Colton*, 127 U.S. 300 (1888) 4

Eaton v. *Eaton*, 132 A. 10 (N.H. 1926) 4

Finch v. *Wachovia Bank & Trust Co.*, 577 S.E.2d 306 (N.C. Ct. App. 2003) 5

Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989) 3, 5, 6

Gallo v. *Amoco Corp.*, 102 F.3d 918 (7th Cir. 1996) 12

Halpin v. *W.W. Grainger, Inc.*, 962 F.2d 685 (7th Cir. 1992) 7

Metropolitan Life Insurance Co. v. *Glenn*, 128 S. Ct. 2343 (2008) 3, 5, 6

Oliver v. *Coca-Cola Co.*, 546 F.3d 1353 (11th Cir. 2008) 6, 9

Pakovich v. *Broadspire Services, Inc.*, 535 F.3d 601 (7th Cir. 2008) 6, 9

Sullivan v. *Sullivan*, 12 N.W.2d 148 (Neb. 1943) 5

TREATISES

III William F. Fratcher, Scott on Trusts (4th ed. 1988) 4

SUPPLEMENTAL BRIEF

Petitioners submit this brief in response to the brief of the United States as *amicus curiae*.

I. REVIEW SHOULD BE GRANTED ON THE FIRST QUESTION.

The Second Circuit held that it had no obligation to defer to the Plan Administrator's interpretation of the Plan on remand from *Frommert I* because there was no Plan Administrator "decision" to which deference could be accorded. Pet. App. 13a. This holding carves out a broad and unwarranted exception to the rule of *Firestone* deference and conflicts with decisions of this Court and other Circuits. *See* Pet. 11-22.

The Government reaches a different conclusion based on an incorrect framing of the decisions below. According to the Government, no deference was due to the Plan Administrator's Plan interpretation on remand because the task on remand was simply to "craft[] a remedy for the administrator's ERISA violations." Br. U.S. 11. In fact, the task on remand was to interpret the remaining Plan provisions that were unaffected by the Second Circuit's finding of a technical ERISA disclosure violation.

In *Frommert I*, the Second Circuit held that the Plan did not properly disclose, and so could not apply, its "phantom account" methodology to participants until 1998. Pet. App. 51a. It then remanded for a determination of the correct offset to Respondents' benefits in light of the "ambiguous manner in which the pre-[1998] terms of the Plan"

addressed this offset question. *Id.* Furthermore, the Second Circuit rejected Respondents' claim for equitable relief because the relief Respondents sought – "recalculation of their benefits consistent with [Plan] terms" – fell "comfortably within the scope of § 502(a)(1)(B)," which allows a plan participant to sue for benefits due "under the terms of [the] plan." *Id.* 53a. Thus, the task on remand was to interpret, for the first time, the pre-1998 Plan terms – *not*, as the Government suggests, to craft an equitable remedy for an ERISA violation.

The Government makes three specific arguments that the decision below was correct, but each is undermined by the Government's erroneous characterization of the task presented on remand. First, the Government argues that trust law authorizes courts to strip plan administrators of *Firestone* deference if they make a mistake in determining the benefits due to plan participants. Second, the Government argues that no deference was due to the Plan Administrator because the Plan Administrator had previously interpreted the same Plan terms in a manner that violated ERISA. Third, the Government argues that no deference was due because the Plan terms were "silent" regarding the proper method for calculating Respondents' benefits. As demonstrated below, each of these contentions is without merit. Because this question is of great practical and precedential significance, the Court should grant the Petition.

A. Trust Law Mandates Deference To The Plan Administrator.

1. Under this Court's decisions in *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008), and *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), a deferential standard of review applies to a plan administrator's interpretation of plan terms to the extent provided by the plan documents and the common law of trusts. *See Glenn*, 128 S. Ct. at 2347-48. The Second Circuit's holding that no deference was due the Plan Administrator's interpretation of Plan terms conflicts with these decisions.

The Government responds that trust law permits a court to override a trustee's discretion to interpret the terms of a trust and "make its own judgment about the benefits due" to a trust beneficiary if the trustee has previously made an "[un]reasonable" or "arbitrary" decision regarding the distribution of trust assets. Br. U.S. 11-12. In the Government's view, this rationale for stripping away *Firestone* deference applies even to cases in which the plan administrator's "arbitrary" or "unreasonable" decision consists of a failure to recognize a technical ERISA disclosure violation that affects the distribution of benefits. *See supra* 1-2. The Government's reasoning likewise authorizes stripping away deference whenever a plan administrator makes an arbitrary finding of fact or unreasonably interprets plan terms. Contrary to the Government's assertion, however, trust law generally allows courts to disregard a trustee's discretionary authority only where the trustee's

conduct is marred by fraud, bad faith, or the like – circumstances that no one contends are present here.

The Government is correct that in reviewing a trustee's distribution of assets, a "court may, *in appropriate circumstances*, itself fix the amount that the trustee shall pay rather than defer to the trustee to determine a reasonable amount." Br. U.S. 11. (internal quotation marks omitted) (emphasis added). However, trust law distinguishes between merely erroneous exercises of discretion, on the one hand, and more troubling conduct, such as fraud or dishonesty, on the other. *See, e.g.*, III William F. Fratcher, Scott on Trusts § 187.1, at 27-31 (4th ed. 1988). In the former case, courts continue to defer to the trustee's judgment; only in the latter case may courts step into the shoes of the trustee. *Id.* Indeed, this Court itself has recognized that courts should not ordinarily control a trustee's discretion where "there is no *mala fides*." *Colton* v. *Colton*, 127 U.S. 300, 320-21 (1888).

Numerous other decisions likewise hold that trustees who erroneously but in good faith interpret the terms of trust instruments may not be stripped of discretion. For example, in *Eaton* v. *Eaton*, the New Hampshire Supreme Court reversed a lower court's decision fixing the amount to be paid for child support. *See* 132 A. 10, 11 (N.H. 1926). Although the court agreed that the trustee had erroneously denied support for the child *entirely*, it held that the trustee – not the court – was entitled to determine the *amount* of support due to the child. *Id.* Deference

was given to the trustee notwithstanding the trustee's earlier abuse of discretion.[1]

Here, the Second Circuit did not find that the Plan Administrator acted dishonestly or in bad faith in applying the "phantom account" offset. Rather, it held that the Plan had not properly disclosed, and so could not apply, the phantom account offset methodology until 1998. Pet. App. 50a-51a. Under these circumstances, both trust law and this Court's decisions in *Firestone* and *Glenn* require deference to the Plan Administrator's determination of the benefits due under the pre-1998 Plan terms.

The Government's contrary view presents an issue of great importance. According to the Government, once a plan administrator makes a mistake of law or unreasonably interprets an ERISA plan, a reviewing court may disregard *Firestone* deference and "make its own judgment about the

---

[1] *Accord Sullivan* v. *Sullivan*, 12 N.W.2d 148, 151 (Neb. 1943) (upholding lower court's decision that trustee had improperly denied support, but reversing its decision to fix the amount of support because "the court cannot act for the trustee or do anything other than prescribe the minimum or maximum limits within which the trustees must act"); *Finch* v. *Wachovia Bank & Trust Co.*, 577 S.E.2d 306, 309-10 (N.C. Ct. App. 2003) (affirming lower court's finding that trustee had "abused its discretion" but vacating order to distribute funds because the trustee still had "discretion whether to disburse any funds").

benefits due." Br. U.S. 11. Such a hair-trigger rule for withdrawing deference would conflict with this Court's decisions in *Firestone* and *Glenn*, would thrust courts into the role of administering pension plans with alarming frequency, and would discourage employers from offering employee benefit plans in the first place. *See* Business Roundtable Amicus Br. 8-12.

2. In arguing that the Second Circuit's decision was correct because *Firestone* deference is no longer required after a plan administrator initially abuses its discretion, the Government underscores the conflict between the Second Circuit's decision and decisions of the Seventh and Eleventh Circuits. The latter Circuits have held that a plan administrator must be given deference in calculating benefits even after the administrator has been found to have arbitrarily and capriciously denied benefits entirely. *See Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353, 1354 (11th Cir. 2008); *Pakovich* v. *Broadspire Servs., Inc.*, 535 F.3d 601, 605-06 (7th Cir. 2008). The rule espoused by the Government – under which deference would be a matter of judicial choice in such circumstances – cannot be reconciled with these decisions.

The Government cites decisions from the First and Ninth Circuits for the proposition that courts have discretion to calculate benefits after finding that a plan administrator arbitrarily and capriciously denied benefits. Br. U.S. 11-12. The cited decisions, however, do not involve plan

interpretation, and thus are inapposite. *See* Pets. Reply Br. 12-13.[2]

The Ninth Circuit decisions, moreover, themselves recognize that, in cases in which a plan administrator "has construe[d] a plan provision erroneously and therefore has not yet had the opportunity of applying the [p]lan, properly construed," the administrator's interpretation of the "properly construed" plan is entitled to deference. *Canseco* v. *Construction Laborers Pension Trust*, 93 F.3d 600, 609 (9th Cir. 1996) (internal quotation marks omitted) (alterations in original); *see* Br. U.S. 12. Contrary to this Ninth Circuit rule, the Second Circuit here declined to defer to the Plan Administrator's interpretation of the pre-1998 Plan terms after the Second Circuit held that the phantom account offset methodology was inadequately disclosed and therefore void before 1998.

Finally, even if the Government were correct that the First and Ninth Circuit decisions are consistent with the decision below, this would only demonstrate the need for this Court to resolve a split among the First, Second and Ninth Circuits, on the one hand, and the Seventh and Eleventh Circuits, on the other.

---

[2] The Government also cites a Seventh Circuit decision that is particularly off-point. *See Halpin* v. *W.W. Grainger, Inc.*, 962 F.2d 685, 697 (7th Cir. 1992) (affirming reinstatement of disability benefits because plan's claims procedure failed to comply with ERISA's "full and fair review" requirement).

B. The Decision Below Was Not Premised On The Fact That The Plan Administrator Interpreted The "Same Terms" On Remand.

The Government also argues that the decision below is correct because this case involves a "second attempt" to interpret the "same" Plan terms. Br. U.S. 14-15. The Government is mistaken.

First, the Second Circuit did not withdraw *Firestone* deference on the ground that the Plan Administrator was giving his second-best interpretation of the same Plan terms. Pet. App. 13a. Rather, it held that no deference was due "because the plan administrator never rendered any *decision* other than the original benefit determinations, all of which were premised on the now-impermissible 'phantom-account' offset mechanism." *Id.* (emphasis added). The court rejected the Plan Administrator's interpretation of the pre-1998 Plan terms as a "mere *opinion*" offered in litigation. *Id.*

Second, it is at most rhetorically true that the Plan Administrator construed the same Plan provisions on remand as it did in its original benefits determination. Since the early 1980s, the Plan Administrator has calculated benefits of rehired employees pursuant to the phantom account methodology. *Id.* 83a-84a. The Plan Administrator, moreover, believed that this approach was supported by Plan provisions other than the non-duplication of benefits provision. *See id.* 66a-67a; 86a. In *Frommert I*, however, the Second Circuit held that the phantom account methodology was inadequately disclosed,

and was therefore void, until 1998. *Id.* 51a-52a. Accordingly, the interpretive question at issue here – *i.e.*, how the offset should be applied based on the non-duplication of benefits provision alone – arose for the first time on remand.

Third, the Second Circuit's decision cannot be meaningfully distinguished from *Oliver* and *Pakovich* on the ground that the Plan Administrator interpreted the "same terms" on remand. In those cases, the courts of appeals mandated deference to the plan administrator's benefits determination *after* the plan administrator's arbitrary and capricious denial of benefits. It cannot be right that a plan administrator who denies benefits entirely is owed continuing deference, whereas an administrator who grants benefits but miscalculates the amount is not. Thus, for purposes of applying *Firestone* deference, there is no principled way to distinguish the errors in *Oliver* and *Pakovich* from the initial error here.

C. The Plan Is Not "Silent" Regarding The Offset.

The Government – unlike Respondents – also contends that the pre-1998 Plan was "silent" regarding the proper calculation of the offset. Br. U.S. 3-4, 9, 13, 14, 16-17. This is incorrect and not what the Second Circuit held.

1. As the Second Circuit recognized in *Frommert I*, the Xerox Plan has "always contained provisions concerning the offset of prior distributions," including the non-duplication of benefits provision. Pet. App. 26a-28a. Accordingly, as the Second Circuit explained, the task on remand was to determine

under the "pre-amendment terms of the Plan" – *i.e.*, pursuant to the non-duplication of benefits provision and without reference to so-called phantom accounting – "how prior distributions were to be treated." *Id.* at 51a.

The Government asserts that the Plan is "silent" on this question and that the Second Circuit therefore "concluded that the pre-1998 Plan (including its non-duplication-of-benefits provision), did not address how to calculate" the offset for prior distributions. Br. U.S. 9. But the Second Circuit did not hold that the pre-1998 Plan terms were "silent" regarding the calculation of the offset; it held that those Plan terms were "ambiguous." Pet. App. 51a. The court also rejected Respondents' claim for equitable relief because "adequate relief" was available from a determination of the benefits due under the terms of the pre-amendment plan. *Id.* 53a-54a.

To be sure, the Second Circuit stated in passing that the pre-1998 Plan "did not *specify* how the Plan would account for the prior distributions," *id.* 28a-29a (emphasis added), but to "specify" means "[t]o state explicitly," Webster's II New College Dictionary (3rd ed. 2005). Failure to state something *explicitly* is entirely consistent with ambiguity. And ambiguity is not a grounds to deny deference but a predicate for deference.

On remand from *Frommert I*, moreover, the District Court plainly understood its task to be interpreting the pre-1998 Plan. *See* Pet. App. 104a ("The Court's task, as directed by the Court of

Appeals, is simply to determine, based on the language of the Plan and the SPD, what benefits are now due...."). The Government is therefore mistaken in suggesting that the courts below held that the pre-1998 Plan was "silent" with respect to the calculation of the offset.

2. There is good reason why the courts below stopped short of holding that the Plan was silent regarding the calculation of the offset. On remand from *Frommert I*, the Plan Administrator submitted a considered interpretation of the pre-1998 Plan terms. *See id.* 144a-54a. This submission makes clear that the pre-1998 Plan was *not* silent regarding the offset.

The Plan calculates benefits for re-hired employees by taking account of *all* of the employees' service to Xerox, including service rendered before their re-hire date. *Id.* 25a-26a. Thus, in the absence of an appropriate offset to take account of the distributions that rehired employees received upon their initial departures, such employees would receive double credit for their initial service. *See* Pet. 5. The Plan's non-duplication of benefits provision is what prevents such double payments.

That provision states that the final retirement benefit of a rehired employee "shall be offset by the *accrued benefit* attributable to such distribution." Pet. App. 141a (emphasis added). The term "accrued benefit" is defined by the Plan, in pertinent part, as "[t]he normal retirement benefit which a [participant] has earned up to any date, and which is payable at Normal Retirement Date" – *i.e.*, as an age

65 annuity – "computed in accordance with ... Section 4.3." *Id.* 134a; 148a. Section 4.3, in turn, specifies that the annuity benefit attributable to a retirement account balance must be calculated "using annuity rates established by the PBGC." *Id.* 141a; 150a.

Based upon these provisions, the Plan Administrator interpreted the Plan to require an offset in an amount equal to the annuity that could have been purchased with the participant's prior lump sum distribution using interest rates specified by the PBGC. *Id.* 148a-50a. This interpretation is amply supported by the terms of the pre-1998 Plan, especially when *Firestone* deference is accorded to the Plan Administrator.

3. Even were the Government correct that the Plan was "silent" regarding the offset calculation, this would not justify withholding deference from the Plan Administrator. As the Seventh Circuit has recognized, it "is implicit in the idea of deferential review" that where "the plan document does not furnish the answer to [a] question, the answer given by the plan administrator ... will ordinarily bind the court." *Gallo* v. *Amoco Corp.*, 102 F.3d 918, 922 (7th Cir. 1996). Thus, as *Gallo* recognizes, silence is not a reason to deny deference but a circumstance requiring it.

II. REVIEW SHOULD BE GRANTED ON THE SECOND QUESTION.

The Second Circuit compounded its error of refusing to accord deference to the Plan Administrator by deferring to the District Court's so-called "allowable discretion" to interpret the Plan on remand. Pet. 29-33. This was a fundamental error: the District Court was obliged to interpret the Plan *correctly* – not just "reasonably" – on remand. The Government's only response is that "allowable discretion" was warranted because "the district court *was not interpreting plan terms* when it fashioned the remedy here, because the plan was *silent* about how to calculate the offset." Br. U.S. 13 (emphasis added). As discussed above (at 1-2, 9-12), that is not correct and is not what the Second Circuit held.

The novel standard of review that the Second Circuit applied to the District Court's interpretation of plan terms exposes employers to the troubling prospect that district courts may adopt any interpretation of a plan that is not "unreasonable" in the course of awarding a remedy in an ERISA case. If this were the law, different district courts could adopt conflicting interpretations of the very same plan, and ERISA's goal of promoting uniform and consistent administration of benefit plans would be thwarted. Pet. 33-34. The Petition should be granted to correct this important error. In the alternative, because the Second Circuit's failure to apply the proper standard of review clearly departed from settled law, summary reversal is warranted.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL D. RYAN
XEROX CORPORATION
45 Glover Avenue
Norwalk, CT 06856

MARGARET A. CLEMENS
NIXON PEABODY LLP
Clinton Square
P.O. Box 31051
Rochester, NY 14603

ROBERT D. WICK
Counsel of Record
RICHARD C. SHEA
JONATHAN L. MARCUS
CHRISTIAN J. PISTILLI
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

Counsel for Petitioners

June 2009

AMICUS CURIAE BRIEF

145

(15)

Supreme Court, U.S.
FILED
NOV 20 2009
OFFICE OF THE CLERK

No. 08-810

In the Supreme Court of the United States

SALLY J. CONKRIGHT, ET AL., PETITIONERS

v.

PAUL J. FROMMERT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

ELENA KAGAN
Solicitor General
Counsel of Record

EDWIN S. KNEEDLER
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DEBORAH GREENFIELD
Acting Deputy Solicitor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether, in this case under Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(1)(B), the court of appeals correctly held that plan administrators were not entitled to deference to their second interpretation of the plan when the court had found that their prior interpretation of the same plan terms was arbitrary and capricious and violated ERISA.

2. Whether the court of appeals correctly upheld the district court's choice of remedy under an abuse-of-discretion standard.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 9
Argument 12
I. The lower courts were not required to defer to the administrators because the administrators had previously abused their discretion in construing the same plan terms 13
A. Trust law, read in light of ERISA's purposes, provides guidance on when courts must defer to plan administrators 13
B. Under trust law, courts need not defer to a fiduciary who has abused his discretion in making the same determination 15
C. ERISA's purposes support the conclusion that deference is not required when an administrator previously abused his discretion in construing the same terms 19
D. The administrators were not entitled to deference 24
II. The court of appeals correctly upheld the district court's choice of remedy under an abuse-of-discretion standard 26
A. A district court's choice of remedy for an ERISA violation is reviewed for abuse of discretion unless the court is interpreting plan terms 27
B. The district court's choice of remedy was based on equitable principles 28
C. The district court did not abuse its discretion 31
Conclusion 34

TABLE OF AUTHORITIES

Page

Cases:

Airline Ticket Comm'n Antitrust Litig., In re, 307 F.3d 679 (8th Cir. 2002) 31
Brown, In re, 29 A.2d 52 (Pa. 1942) 18
Brubaker v. *Metropolitan Life Ins. Co.*, 482 F.3d 586 (D.C. Cir. 2007) 27
Burkhart Grob Luft und Raumfahrt GmbH & Co. KG v. *E-Sys., Inc.*, 257 F.3d 461 (5th Cir. 2001) 27
Central Laborers' Pension Fund v. *Heinz*, 541 U.S. 739 (2004) 30
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 22
Collister v. *Fassitt*, 57 N.E. 490 (N.Y. 1900) 16
Colton v. *Colton*, 127 U.S. 300 (1888) 16, 17
Cook v. *Liberty Life Assurance Co.*, 320 F.3d 11 (1st Cir. 2003) 27
Cool v. *Shepherd (In re Cool's Trusteeship)*, 230 N.W. 353 (Iowa 1930) 18
Cooter & Gell v. *Hartmarx Corp.*, 496 U.S. 384 (1990) ... 28
Curtiss-Wright Corp. v. *Schoonejongen*, 514 U.S. 73 (1995) 21, 25
Eaton v. *Eaton*, 132 A. 10 (N.H. 1926) 18
Emmert v. *Old Nat'l Bank*, 246 S.E.2d 236 (W. Va. 1978) 18
Finch v. *Wachovia Bank & Trust Co.*,, 577 S.E.2d 306 (N.C. Ct. App. 2003) 18
Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989) 13, 14, 15, 22
Gardner v. *O'Loughlin*, 84 A. 935 (N.H. 1912) 18

Cases—Continued: Page

Glenn v. *MetLife*, 461 F.3d 660 (6th Cir. 2006), aff'd, 128 S. Ct. 2343 (2008) 15

Grossmuller v. *UAW, Local 813*, 715 F.2d 853 (3d Cir. 1983) 27

Grosz-Salomon v. *Paul Revere Life Ins. Co.*, 237 F.3d 1154 (9th Cir. 2001) 27

Halpin v. *W.W. Grainger, Inc.*, 962 F.2d 685 (7th Cir. 1992) 27

Hanford v. *Clancy*, 183 A. 271 (N.H. 1936) 19

INS v. *Ventura*, 537 U.S. 12 (2002) 22

LPN Trust v. *Farrar Outdoor Adver., Inc.*, 552 N.W.2d 796 (S.D. 1996) 31

LaBonde v. *Weckesser, (In re Hafemann's Will)*, 62 N.W.2d 561 (Wis. 1954) 18

Layaou v. *Xerox Corp.*, 238 F.3d 205 (2d Cir. 2001) 3, 6

Manning v. *Sheehan*, 133 N.Y.S. 1006 (Sup. Ct. 1911) ... 18

Massachusetts Mut. Life Ins. Co. v. *Russell*, 473 U.S. 134 (1985) 25

Metropolitan Life Ins. Co. v. *Glenn*, 128 S. Ct. 2343 (2008) 14, 15, 22

Miller v. *United Welfare Fund*, 72 F.3d 1066 (2d Cir. 1955) 23

Miller v. *Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006), cert. denied, 549 U.S. 1280 (2007) 1, 2, 26

Old Colony Trust Co. v. *Rodd*, 254 N.E.2d 886 (Mass. 1970) 18

Oliver v. *Coca-Cola Co.*, 546 F.3d 1353 (11th Cir. 2008) .. 23

Cases—Continued: Page

Pakovich v. *Broadspire Servs., Inc.*, 535 F.3d 601 (7th Cir. 2008) 23
Piuma v. *Minetti (In re Marre's Estate)*, 114 P.2d 586 (Cal. 1941) 18
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 22
Schofield v. *Commerce Trust Co.*, 319 S.W.2d 275 (Mo. App. 1958) 18
Stallard v. *Johnson*, 116 P.2d 965 (Okla. 1941) 18
State v. *Rubion*, 308 S.W.2d (Tex. 1958) 17
Sullivan v. *Sullivan (In re Sullivan's Will)*, 12 N.W.2d 148 (Neb. 1943) 18
United States v. *Andrews*, 530 F.3d 1232 (10th Cir. 2008) 27
Varity Corp. v. *Howe*, 516 U.S. 489 (1996) 14
Vizcaino v. *Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997), cert. denied, 522 U.S. 1098 (1998) 23
Woodward v. *Dain*, 85 A. 660 (Me. 1913) 18
Yolton v. *El Paso Tenn. Pipeline Co.*, 435 F.3d 571 (6th Cir.), cert. denied, 549 U.S. 1019 (2006) 27
Zervos v. *Verizon N.Y., Inc.*, 277 F.3d 635 (2d Cir. 2002) 27

Statute and regulations:

Employee Retirement Income Security Act of 1974, Tit. I, 29 U.S.C. 1001 *et seq.* 1
29 U.S.C. 1001(b) 19, 21
29 U.S.C. 1002(21)(A) 20
29 U.S.C. 1022 ..... 5, 20, 25, 29
29 U.S.C. 1022(a) 5

Statute and regulations—Continued: Page

29 U.S.C. 1054(c)(3) 26
29 U.S.C. 1054(g) (2000) 5, 6, 25
29 U.S.C. 1054(h) (2000) 5, 6, 25
29 U.S.C. 1056(a) 21
29 U.S.C. 1104(a)(1)(A) 20
29 U.S.C. 1104(a)(1)(D) 30, 32
29 U.S.C. 1132(a)(1)(B) (§ 502(a)(1)(B)) 4, 13, 15, 21, 30
29 U.S.C. 1132(a)(3) (§ 502(a)(3)) 4
29 U.S.C. 1133 21
26 C.F.R.:
Section 1.401(a)(4)-8(d)(1)(i) 33
Section 1.411(a)-4(a) 26
29 C.F.R. 2509.75-8 20

Miscellaneous:

George Gleason Bogert & George Taylor Bogert, *The Law of Trusts & Trustees* (rev. 2d ed. 1980) 15, 16
1 Restatement (Second) of Contracts (1981) 31
Restatement (Second) of Trusts (1959):
Vol. 1 ..... 14, 15
Vol. 2 31
2 Restatement (Third) of Trusts (2003) 15, 16
Rev. Rul. 76-259, 1976-2 C.B. 111 ..... 26, 33
3 Austin Wakeman Scott et al., *Scott and Ascher on Trusts* (5th ed. 2007) 16, 17
Webster's International Dictionary of the English Language (1890) 17

In the Supreme Court of the United States

No. 08-810

SALLY J. CONKRIGHT, ET AL., PETITIONERS

v.

PAUL J. FROMMERT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case is an action under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, which the Secretary of Labor has primary authority for administering. At the invitation of the Court, the United States filed an amicus brief at the petition stage.

STATEMENT

1. Before 1989, Xerox Corporation provided its employees with a defined benefit pension plan called the Retirement Income Guarantee Plan (Retirement Plan or Plan) and a defined contribution plan called the Profit Sharing Plan (PSP). *Miller* v. *Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871, 872 (9th Cir. 2006), cert.

denied, 549 U.S. 1280 (2007). The Retirement Plan provided each participant a fixed benefit based on his compensation and total years of service, while the PSP provided each participant the value of an individual account that consisted of annual contributions and the results of the investment performance of those contributions. *Ibid.* The Retirement Plan and PSP worked together as a "floor-offset" arrangement, under which an employee was guaranteed the Retirement Plan benefit, offset by any benefit received from the PSP, but could receive a higher benefit if that would be produced by the PSP alone. *Ibid.*

In 1989, Xerox eliminated the PSP and substantially restructured the Retirement Plan by providing for the payment of benefits according to one of three alternative formulas. Pet. App. 27a; see J.A. 6a-42a (1989 Restatement). The 1989 Restatement included a revised defined benefit formula based on compensation and total years of service (RIGP). Pet. App. 25a. It also included two new accounts—a Cash Balance Retirement Account (CBRA) and a Transitional Retirement Account (TRA). *Id.* at 26a. The CBRA, available to all employees, provided a benefit based on the balance of an employee's former PSP account, if any, increased by annual contributions by Xerox equal to five percent of the employee's salary, plus interest at a specified rate. *Ibid.* The TRA, available only to employees hired before 1989, provided a benefit based on the balance in the employee's PSP account, if any, plus gains or losses based on the investment results of the funds in which that account was invested on December 31, 1989. *Ibid.* A retiring employee was entitled to benefits based on whichever calculation method—RIGP, CBRA, or TRA—yielded the highest amount. *Id.* at 25a-26a.

To avoid paying duplicative benefits to rehired employees who had previously received retirement distributions, the 1989 Restatement provided for an offset as follows:

> *Nonduplication of Benefits.* In the event any part of or all of a [participant's] accrued benefit is distributed to him prior to his Normal Retirement Date, if Section 8.8 [dealing with incompetent beneficiaries] does not apply to such distribution and such [participant] at any time thereafter recommences active participation in the Plan, the accrued benefit of such [participant] based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

J.A. 32a (§ 9.6).

2. The Retirement Plan administrators, who with the Plan are the petitioners in this case, interpreted the 1989 Restatement, including the non-duplication-of-benefits provision, to authorize use of a "phantom account" to calculate the offset for prior distributions (including PSP distributions). See Pet. App. 40a, 42a, 83a-86a; J.A. 70a, 77a-78a.[1] Under the phantom-account method, in determining which of the three benefit options provides the highest benefit, the administrators increased the value of the CBRA and TRA accounts to include not only prior lump-sum distributions but also the investment returns that those sums would have achieved if they had remained in the account. Pet. App.

---

[1] Because the term "phantom account" has been used throughout this litigation, including by Xerox, see *Layaou* v. *Xerox Corp.*, 238 F.3d 205, 207 (2d Cir. 2001) (Sotomayor, J.), this brief uses that term rather than "reconstructed account methodology," the term now used by petitioners (Br. 10).

32a-33a. By including a large amount of hypothetical growth, the phantom-account method skewed the comparison among the alternatives in favor of selecting the CBRA or TRA as providing the highest benefit. *Id.* at 50a. If the CBRA or TRA was selected, however, the phantom-account value was then deducted to compute the amount actually paid to the employee, producing a benefit significantly less than what the RIGP would have provided. *Ibid.*[2]

In 1996, respondent Paul Frommert received an estimate of his Retirement Plan pension that demonstrates the impact of the phantom-account methodology. Pet. App. 34a. Frommert, like the other respondents, previously worked for Xerox, left the company before 1989, and was later rehired. *Ibid.* When Frommert left the company, he (again like the other respondents) received a lump-sum distribution from his PSP account. See Pet. App. 84a; Pet. Br. 9. After Frommert was rehired, he received benefits statements that, by 1996, projected that he would receive a monthly pension, using the RIGP formula, of $2842. Pet. App. 34a. But use of the phantom account reduced his monthly pension to $5.31. *Ibid.*

3. In 1999, respondents sued petitioners under Section 502(a)(1)(B) and (3) of ERISA, 29 U.S.C. 1132(a)(1)(B) and (3). Respondents argued that, until the Plan and its summary plan description (SPD) were amended in 1998, the Plan did not provide for use of the phantom account to calculate the offset for prior PSP distributions and that the SPD did not disclose that the phantom account would be used. Pet. App. 75a, 81a-82a.

---

[2] If the RIGP benefit was selected, that benefit was reduced by the next highest benefit amount (with the phantom-account value included in the reduction). Pet. App. 33a n.6.

Respondents contended that use of the phantom account therefore violated various provisions of ERISA, including 29 U.S.C. 1022 and 29 U.S.C. 1054(g) and (h) (2000). Pet. App. 75a-76a.

Section 1022 requires a plan administrator to give participants an SPD that is "sufficiently accurate and comprehensive to reasonably apprise [them] of their rights and obligations under the plan," "in a manner calculated to be understood by the average plan participant." 29 U.S.C. 1022(a). Section 1054(g), ERISA's anti-cutback provision, prohibits plan amendments that decrease accrued benefits. 29 U.S.C. 1054(g) (2000). Section 1054(h) requires a pension plan administrator to give participants prior written notice of plan amendments that significantly reduce the rate of future benefit accrual. 29 U.S.C. 1054(h) (2000).

The district court granted summary judgment to petitioners. Pet. App. 61a-98a. As relevant here, the court accepted their argument that "the Plan has always provided for the challenged offset" and that the 1998 amendments only made express what prior plan terms implicitly provided. *Id.* at 75a; see *id.* at 79a-93a.

4. The court of appeals vacated the district court's decision in relevant part. Pet. App. 22a-60a. The court of appeals first held "that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable," even under "an arbitrary or capricious standard" of review. *Id.* at 44a. The court reasoned that, although the Plan has always contained a non-duplication provision stating that benefits will be offset by prior distributions, *id.* at 26a-28a, the pre-1998 plan terms did not specify how to calculate the offset for the distributions received by respondents. See *id.* at 28a-29a, 37a. The court further observed that it had

already held, in *Layaou* v. *Xerox Corp.*, 238 F.3d 205, 209-212 (2d Cir. 2001) (Sotomayor, J.), that the Plan had violated ERISA's SPD requirement by failing to "provide notice" that rehired employees' "future benefits would be offset by an appreciated value of their prior lump-sum benefits distributions." Pet. App. 43a-44a (citation omitted).

The court next held that petitioners' efforts to apply the phantom-account method before the 1998 amendments violated the requirement in Section 1054(h) that plans provide advance notice of amendments that significantly reduce the rate of future benefit accrual. Pet. App. 45a-49a. The court concluded that, based on the information provided to them, "rehired employees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they actually received." *Id.* at 47a. The court further concluded that use of the phantom account impermissibly reduced accrued benefits in violation of Section 1054(g). *Id.* at 50a-51a.

The court of appeals remanded the case for the district court to craft a remedy for those ERISA violations, "utiliz[ing] an appropriate pre-amendment calculation to determine [respondents'] benefits." Pet. App. 51a. It suggested that the district court "employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." *Ibid.*

5. On remand, the Plan and its administrators advocated two alternative approaches for calculating respondents' benefits. The first approach would, like the phantom account, have offset an employee's benefits by an appreciated value of his prior distribution (the administrators' appreciated-offset method). Unlike the phantom-account method, however, the administrators'

appreciated-offset method would have used a fixed interest rate, rather than hypothetical investment earnings, to calculate the appreciation. Using that rate, the administrators would have converted the employee's prior distribution into an annuity and then subtracted that annuity from the employee's RIGP benefit, expressed as an annuity and calculated using total years of service. The reduced RIGP benefit would then have been compared to the annuities that would be generated by the employee's actual CBRA and TRA balances, and the employee would have received the highest benefit. The administrators would, however, have used this approach only for benefits that accrued before the 1998 amendments. The phantom-account approach would have been used for later-accruing benefits. Pet. App. 147a-154a.

The second approach proposed by petitioners would have treated rehired employees the same as newly-hired employees, calculating their CBRA and TRA benefits based on only the actual amount in their accounts and their RIGP benefits based only on their years of service and compensation after they were rehired (the new-hire approach). 07-0418-CV Pet. C.A. Br. 6, 16, 33-36; 07-0418-CV C.A. App. A113-A114, A298, A930-A931.

Respondents also proposed two alternatives for calculating their benefits. Under one alternative, RIGP benefits would have been calculated based on employees' total years of service and would have been offset by only the actual amounts of their prior distributions. J.A. 87a-88a. Respondents contended that this method appropriately reflected their reasonable expectations based on the pre-1998 SPD. J.A. 88a-89a. Under respondents' second alternative, the offset would have

been adjusted upward, but using a different calculation than the one suggested by petitioners. J.A. 81a-86a.

The district court decided to subtract the actual amount of prior distributions without any upward adjustment. Pet. App. 104a-107a. The court noted that the pre-1998 Plan terms and SPD said "virtually nothing" about how to take into account prior distributions. *Id.* at 104a. The court concluded that subtracting only the actual amount of the distributions was straightforward, adequately prevented employees from receiving a windfall, and "most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD." *Id.* at 107a. The court rejected the proposed calculation methods that would have made upward adjustments to the distributions, reasoning that "[i]f the employee had no notice of the 'phantom account,' he also had no notice" of those other mechanisms for calculating the offset. *Id.* at 104a.

6. The court of appeals affirmed the district court's decision in relevant part. Pet. App. 1a-21a. It reviewed the district court's choice of remedy for abuse of discretion, *id.* at 8a, and concluded that petitioners had not established that the court's approach "violated either the Plan terms or any law." *Id.* at 9a. The court of appeals also rejected petitioners' arguments that the district court erred by not adopting the new-hire approach, by not remanding to the administrators, and by declining to defer to the administrators' appreciated-offset approach. *Id.* at 9a-14a.

In addressing the deference due the administrators' appreciated-offset approach, the court of appeals recognized that where an ERISA plan gives an administrator discretion to construe plan terms, courts should review the administrator's interpretation "under an excess of

allowable discretion standard." Pet. App. 12a. The court of appeals concluded, however, that the deference principle did not apply here because the district court had no "decision" to review. *Id.* at 13a. The court of appeals explained that petitioners had identified "no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and [the court] found such a construction to have violated ERISA." *Ibid.* Because the Plan "addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence," the court saw "no problem with the District Court's selection of one reasonable approach among several reasonable alternatives." *Id.* at 13a-14a.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that the district court was not required to defer to the administrators' views on how to remedy their ERISA violations. Contrary to petitioners' assertions, the court of appeals did not adopt a broad rule withholding deference whenever an administrator interprets a plan outside of a benefits determination. Instead, the court of appeals held only that the district court was not required to defer to the administrators' second interpretation of plan terms that they previously had abused their discretion in construing.

That holding is consistent with trust law, which guides the standards of review in ERISA benefits cases. Under trust law, a court is not required to give a trustee a second opportunity to make a determination that he abused his discretion in making initially. Instead, the

court has remedial latitude and may remedy the abuse of discretion in appropriate circumstances by directing the trustee how to act. Likewise, a court need not give a plan administrator who has abused his discretion in construing plan terms a second opportunity to interpret those terms. The court may itself fashion the appropriate remedy, consistent with applicable plan terms.

Allowing courts to decline to defer to administrators' fallback interpretations also furthers ERISA's purpose of protecting employee benefits. Requiring deference to administrators' subsequent attempts to construe the same terms that they previously construed arbitrarily and in violation of ERISA would encourage initial interpretations that disfavor beneficiaries and thereby undermine ERISA's fiduciary-duty requirement. That approach would also undermine ERISA's disclosure requirements and discourage participants from challenging unreasonable denials of benefits.

The court of appeals correctly applied the applicable deference principles. The district court was not required to defer to the administrators' position that the pre-1998 plan terms provided for their appreciated-offset method, because the administrators had previously abused their discretion and violated specific prohibitions in ERISA by construing the same terms to provide for the phantom-account method. Deference to the administrators' new approach was also inappropriate because, in the circumstances of this case, interpreting the Plan to provide for the administrators' appreciated-offset method would have violated ERISA.

II. The court of appeals correctly upheld the district court's choice of remedy under an abuse-of-discretion standard. A district court's interpretation of plan terms is subject to de novo appellate review even when the

district court is fashioning a remedy. But when a court has determined that an administrator's denial of benefits was arbitrary and capricious or otherwise violated ERISA, the district court's choice of remedy, if based on equitable principles rather than a determination that plan terms required a particular result, is reviewed for abuse of discretion. That is consistent with trust law, under which appellate courts apply that deferential standard in reviewing a lower court's selection of an equitable remedy.

The district court's remedial decision here was based on equitable principles, as the court of appeals had contemplated, rather than a determination that plan terms required that decision. Because the Plan and the SPD said virtually nothing about how to calculate the offset for respondents' prior distributions, reliance on proposed plan interpretations (such as the administrators' appreciated-offset method) that offset an appreciated value of the distributions would have violated ERISA's notice requirements. The district court therefore correctly rejected those interpretations and relied instead on equitable principles in selecting an offset that was otherwise consistent with the Plan as written.

In offsetting only the actual prior distributions without any upward adjustment, the district court acted well within its discretion. The court's approach best comported with respondents' reasonable expectations, the terms of the Plan, and the requirements of ERISA. It did not give respondents a windfall. Nor was it unfair to other employees, who are not similarly situated. Neither ERISA nor laws governing tax qualification of plans required an actuarial adjustment to the offset. On the contrary, under the circumstances of this case, using

the administrators' appreciated-offset method would have been unreasonable and violated ERISA.

ARGUMENT

Petitioners incorrectly contend that this case presents two broad questions about the standards of review in ERISA cases. The first question, according to petitioners (Br. i), is whether courts should defer to an administrator's interpretation of an ERISA plan only when the administrator renders the interpretation in resolving an administrative claim for benefits. The second question, petitioners assert (*ibid.*), is whether a district court's interpretation of plan terms is reviewed only for abuse of discretion if it interprets the plan in remedying an ERISA violation.

In reality, the case presents two much narrower questions. The first is whether the courts below were required to defer to the administrators' second interpretation of plan terms once their previous interpretation had been held arbitrary and capricious and in violation of ERISA. The second question is whether the court of appeals correctly upheld the district court's decision on remand under abuse-of-discretion review, given that the district court was fashioning an equitable remedy. Because the courts below were not required to defer to the administrators' fallback interpretation, and because the court of appeals applied the correct standard in reviewing the district court's remedial decision, this Court should affirm the decision below.

I. THE LOWER COURTS WERE NOT REQUIRED TO DEFER TO THE ADMINISTRATORS BECAUSE THE ADMINISTRATORS HAD PREVIOUSLY ABUSED THEIR DISCRETION IN CONSTRUING THE SAME PLAN TERMS

Contrary to petitioners' contention, the court of appeals did not hold that deference to an administrator's construction of an ERISA plan extends only to "decisions made on 'original benefits determinations.'" Pet. Br. 32 (quoting Pet. App. 13a). The court noted that, in this case, "the plan administrator never rendered a decision other than the original benefits determinations," which were premised on an interpretation of the Plan that the court had found to be unreasonable and impermissible under ERISA. Pet. App. 13a. But the court did not hold that deference is never due an administrator's interpretation "outside the context of an original claims determination." Pet. Br. 32. Instead, the court of appeals held that a court is not required to defer to an administrator's interpretation when, as in this case, "the administrator had previously construed the same terms and [the court] found such a construction to have violated ERISA." Pet. App. 13a. That holding is correct.

A. Trust Law, Read In Light Of ERISA's Purposes, Provides Guidance On When Courts Must Defer To Plan Administrators

ERISA does not specify the standards of review governing actions that, like this one, challenge an administrator's benefits determination under 29 U.S.C. 1132(a)(1)(B). *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 109 (1989). This Court concluded in *Firestone*, however, that "principles of trust law" provide

the primary guide in determining those standards, because Congress relied on trust law in shaping ERISA's protections. *Id.* at 110-111. The Court also considered ERISA's purposes, see *id.* at 113-115, recognizing, as it has in other cases, that reliance on trust law in construing ERISA must be tempered by attention to the statutory language, structure, and goals. See *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996).

Applying those principles, the Court held in *Firestone* that an administrator's benefits decision, including his interpretation of plan terms, is generally subject to de novo judicial review. 489 U.S. at 111-115. When, however, a plan gives the administrator discretion to determine benefits eligibility or to construe plan terms, review is more deferential. *Ibid.* In that circumstance, the Court noted, a trustee's exercise of a discretionary power "is not subject to control by the court except to prevent an abuse by the trustee of his discretion." *Id.* at 111 (quoting 1 Restatement (Second) of Trusts § 187, at 402 (1959) (Second Restatement)).

The Court reaffirmed *Firestone*'s approach in *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008). Considering both trust law and ERISA's purposes, *id.* at 2349-2351, the Court held that, if a plan gives an administrator discretion to make benefits determinations, the administrator's conflict of interest is considered as one "of several different, often case-specific, factors" that are "weigh[ed] all together" in determining whether he abused his discretion, *id.* at 2351. Applying that standard, the Court affirmed the decision of the court of appeals, *id.* at 2352, which had set aside the administrator's termination of the participant's benefits and ordered them reinstated, see

Glenn v. *MetLife*, 461 F.3d 660, 675 (6th Cir. 2006), aff'd, 128 S. Ct. 2343 (2008).

Firestone and *Glenn* thus make clear that trust law, read in light of ERISA's purposes, guides courts in determining the standards of review to use in actions under 29 U.S.C. 1132(a)(1)(B). Neither *Firestone* nor *Glenn* directly addresses whether an administrator who has abused his discretion in construing plan terms is entitled to deference to his fallback interpretation of the same terms. Both cases recognize, however, that trust law and ERISA authorize courts to control the actions of a fiduciary, including a plan administrator, who has abused his discretion. See *Firestone*, 489 U.S. at 111; *Glenn*, 128 S. Ct. at 2352. The court of appeals acted in accord with that recognition in holding that courts need not defer to an administrator's second attempt to interpret plan terms that he previously abused his discretion in construing.

B. Under Trust Law, Courts Need Not Defer To A Fiduciary Who Has Abused His Discretion In Making The Same Determination

The court of appeals' holding is supported by trust law, under which courts are not required to afford a trustee a second opportunity to make a determination that he already abused his discretion in making. As this Court recognized in *Firestone* and *Glenn*, courts will control trustees in the exercise of discretionary powers whenever they abuse their discretion. 1 Second Restatement § 187, at 402; 2 Restatement (Third) of Trusts § 50, at 258 (2003) (Third Restatement). "Where the court finds that there has been an abuse of a discretionary power, the decree to be rendered is in its discretion." George Gleason Bogert & George Taylor Bogert,

The Law of Trusts & Trustees § 560, at 222 (rev. 2d ed. 1980) (Bogert). The court may exercise that discretion either by ordering the trustee to make "a new decision * * * in the light of rules expounded by the court," or by "decid[ing] for the trustee how he should act," including "by stating the exact result [the court] desires to achieve." *Id.* at 222-223; see Third Restatement § 50 & cmt. b at 258, 261.

Courts often choose to direct how the trustee should act when they conclude that the trustee did not exercise his discretion "honestly and fairly." 3 Austin Wakeman Scott et al., *Scott and Ascher on Trusts* § 18.2.1, at 1348 (5th ed. 2007) (Scott); see, *e.g.*, *Collister* v. *Fassitt*, 57 N.E. 490, 493-494 (N.Y. 1900). But contrary to petitioners' contention (Br. 39-46), courts also frequently direct trustees to take specific actions without finding that they engaged in "fraud, bad faith, or dishonesty." Br. 39. Indeed, as petitioners acknowledge (Br. 45), courts, in numerous cases, have ordered trustees to pay specific amounts to beneficiaries without such findings. See Bogert 223 n.19.

For example, in *Colton* v. *Colton*, 127 U.S. 300 (1888), this Court construed a testator's will to provide a trust for the support of certain relatives, *id.* at 321, rejecting the executor's contention that the will's provisions were too indefinite for a trust to be recognized or enforced, *id.* at 319. Because the executor had failed to provide for the trust beneficiaries, this Court instructed the courts below "to determine and declare, what provision will be suitable and best under the circumstances, and all particulars and details for securing and paying it." *Id.* at 322. The Court stated that fixing the payments due was "the duty of the court," even though it

had made no finding that the trustee acted dishonestly or in bad faith. *Ibid.*[3]

Similarly, in *State* v. *Rubion*, 308 S.W.2d 4 (1958), the Texas Supreme Court held that, when a trustee has abused his discretion by failing to make payments to a beneficiary, a court may either fix the amount due or declare the boundaries of reasonable discretion to be exercised by the trustee. *Id.* at 9-11. The Texas Supreme Court then directed the trial court to specify the amounts to be paid, because that would "better promote a speedy administration of justice and a final termination of th[e] litigation." *Id.* at 11.

Some authority suggests that courts will not "ordinarily" direct a trustee how to act absent "reason to believe that the trustee will not fairly exercise [his] discretion." Scott 1348-1349. But one circumstance in which courts may have reason to believe that a trustee will not fairly exercise his discretion is when the trustee already abused his discretion in making the same deter-

---

[3] Elsewhere in its opinion, the Court stated that "where the manner of executing a trust is left to the discretion of trustees, and they are willing to act, and there is no *mala fides*, the court will not ordinarily control their discretion." *Colton*, 127 U.S. at 320-321. But the Court made that statement in explaining that a "court will not take upon itself, *in the first instance*," to determine the amount due beneficiaries. *Id.* at 321 (emphasis added). The Court did not suggest that a court may not fix the amount due after finding that a trustee has abused his discretion. Moreover, the Court stated that courts will intervene not only when "the exercise of the discretion by the trustees is infected with fraud or misbehavior" but also when "they decline to undertake the duty of exercising the discretion," as the executor did in *Colton*, or "generally where the discretion is mischievously and erroneously exercised." *Ibid.*; see *Webster's International Dictionary of the English Language* 929 (1890) (defining "mischievous" as "harmful" or "hurtful" and noting that the word was then "often applied where the evil [was] done carelessly").

mination. Thus, courts frequently fix the amount that a trustee must pay a beneficiary after finding that the trustee abused his discretion by setting an unreasonably low amount. See, *e.g.*, *Cool* v. *Shepherd (In re Cool's Trusteeship)*, 230 N.W. 353, 356 (Iowa 1930); *Woodward* v. *Dain*, 85 A. 660, 661 (Me. 1913) (per curiam); *Schofield* v. *Commerce Trust Co.*, 319 S.W.2d 275, 277-278 (Mo. App. 1958); *Gardner* v. *O'Loughlin*, 84 A. 935, 936 (N.H. 1912); *Stallard* v. *Johnson*, 116 P.2d 965, 967 (Okla. 1941); *Emmert* v. *Old Nat'l Bank*, 246 S.E.2d 236, 244-245 (W. Va. 1978); *LaBonde* v. *Weckesser (In re Hafemann's Will)*, 62 N.W.2d 561, 564 (Wis. 1954).

In contrast, when a trustee has not yet exercised his discretion to determine how much to pay, but instead has failed to make payments because of a mistaken belief that he lacks that discretion, the court may have no reason to believe that the trustee will fail to act fairly in exercising his discretion once the court makes clear that it exists. The cases cited by petitioners (Br. 40-42), in which courts have decided that the trustee rather than the court should exercise discretion, generally fall in that category. See *Piuma* v. *Minetti (In re Marre's Estate)*, 114 P.2d 586, 590-591 (Cal. 1941); *Sullivan* v. *Sullivan (In re Sullivan's Will)*, 12 N.W.2d 148, 151 (Neb. 1943); *Eaton* v. *Eaton*, 132 A. 10, 11 (N.H. 1926); *Manning* v. *Sheehan*, 133 N.Y.S. 1006, 1008 (Sup. Ct. 1911); *Finch* v. *Wachovia Bank & Trust Co.*, 577 S.E.2d 306, 309 (N.C. Ct. App. 2003); *In re Brown*, 29 A.2d 52, 54-55 (Pa. 1942).[4]

---

[4] *Old Colony Trust Co.* v. *Rodd*, 254 N.E.2d 886 (Mass. 1970), involved a comparable situation. The trustee made unreasonably low payments because he misunderstood the standard guiding his discretion, and the court determined that he should have the opportunity to exercise his discretion going forward under the correct standard. *Id.*

Trust law thus supports the court of appeals' conclusion that deference is not required when an administrator proposes a second interpretation of plan terms that he previously construed unreasonably and in violation of ERISA. Just as a court need not give a traditional trustee a second opportunity to make a determination that he has already abused his discretion in making, a court need not give an ERISA plan administrator who has abused his discretion in construing plan terms a second opportunity to construe those same terms.

C. ERISA's Purposes Support The Conclusion That Deference Is Not Required When An Administrator Previously Abused His Discretion In Construing The Same Terms

The court of appeals' conclusion that courts are not required to defer to an administrator's second interpretation of plan terms also furthers ERISA's purposes.

1. Congress's principal purpose in enacting ERISA was "to protect * * * the interests of participants in employee benefit plans." 29 U.S.C. 1001(b). ERISA advances that goal by imposing various requirements on plans and plan administrators. See *ibid.* Those requirements would be significantly undercut if courts were always required to defer to administrators' fallback interpretations after they abused their discretion in construing the same terms.

One of ERISA's central protections is the fiduciary duty requirement, which mandates that plan administrators act solely in the interest of participants and ben-

---

at 890. In *Hanford* v. *Clancy*, 183 A. 271 (N.H. 1936), on the other hand, the court stated in dicta that a court "may not exercise discretion for" the trustee even after finding that he exercised that discretion unreasonably. *Id.* at 272.

eficiaries, for the exclusive purpose of providing benefits to them. See 29 U.S.C. 1002(21)(A), 1104(a)(1)(A); 29 C.F.R. 2509.75-8 (Q&A D-3). Adherence to that fundamental obligation would be undermined if courts were required to defer to an administrator's subsequent interpretations of plan terms. In that circumstance, administrators would have less incentive to adopt the most reasonable interpretation of plan provisions when first adjudicating benefits claims, particularly if that interpretation favored beneficiaries at the expense of the plan. Administrators could instead initially adopt interpretations that unreasonably disfavored beneficiaries, because the administrators would know that, if challenged and reversed, they would have a second chance to advance a more reasonable interpretation.

Indeed, under petitioners' view, administrators would have a potentially unlimited number of bites at the interpretation apple. Unless an administrator engaged in "fraud, bad faith, or dishonesty" (Pet. Br. 39), courts would be required to defer, no matter how many times the administrator had abused his discretion in construing the very same terms. Such a rule not only would provide administrators scant incentive to interpret plans reasonably in the first instance, but also would impose on courts the difficult task of ascertaining the administrators' subjective motivations and the nontrivial prospect of adjudicating multiple iterations of the same essential controversy.

Requiring courts to defer to administrators' fallback interpretations would also undermine ERISA's disclosure requirements, including its mandate that plans provide sufficient and sufficiently clear information for participants to understand their benefit entitlements. See 29 U.S.C. 1022. That requirement is designed to

prevent employers from writing plans with "ambiguity, contradiction or silence," Pet. App. 13a, and then attempting, as petitioners are doing here, to minimize the plan's liability by adopting interpretations that beneficiaries could not have foreseen. But, if administrators get repeated opportunities to interpret and reinterpret unclear terms, employers will have every incentive to take that path, rather than to draft terms clearly in the first instance. That would thwart "one of ERISA's central goals"—"to enable plan beneficiaries to learn their rights and obligations at any time." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995).

Requiring deference to subsequent interpretations would also undercut ERISA's requirement of prompt claims processing and "full and fair review" of benefit claims, 29 U.S.C. 1056(a), 1133, to ensure accuracy in claims processing. Administrators could deny benefits in the administrative claims process knowing that they would have additional opportunities to justify any denials that were challenged in court. At the same time, beneficiaries would know that, if they challenged a denial, they would likely be required to establish the unreasonableness of not only the administrator's initial interpretation but also other possible but not yet articulated interpretations. Beneficiaries would therefore be deterred from invoking the statutory right Congress afforded them to establish their rights to benefits in court under 29 U.S.C. 1132(a)(1)(B). See also 29 U.S.C. 1001(b) (one principal purpose of ERISA is to provide for "appropriate remedies, sanctions, and ready access to the Federal courts").

2. Contrary to petitioners' contentions (Br. 28-32, 47-48), speculation that employers will cease offering benefit plans does not justify requiring courts to defer

to an administrator's subsequent interpretations. This Court rejected a similar argument in *Firestone* when it held that de novo review is the default standard in benefits cases. 489 U.S. at 114-115. The Court concluded that the risk of discouraging employers from offering plans was "not sufficient to outweigh the reasons for a *de novo* standard." *Id.* at 115. Here too, the reasons for allowing courts to withhold deference outweigh concerns about discouraging plan formation.

That is particularly true because employers are unlikely to stop offering plans merely because courts need not defer to administrators' fallback interpretations of terms that the administrators previously construed arbitrarily. That principle will not result in "inconsistent interpretations and unexpected liabilities" (Pet. Br. 47) if administrators simply interpret plan terms reasonably in the first instance (at which point courts will give them deference). And, even if an administrator interprets a plan unreasonably and is denied deference to his fallback interpretation, an employer can minimize any adverse consequences by amending the plan to adopt its preferred interpretation going forward.[5]

---

[5] Petitioners are also wrong to suggest (Br. 49 n.17) that principles of administrative law provide a basis for requiring deference to administrators' fallback interpretations of plan terms. "The standard of review for agency determinations has little to nothing to do with the appropriate" standards of review in ERISA benefits cases. *Glenn*, 128 S. Ct. at 2353 (Roberts, C.J., concurring in part and concurring in the judgment). Rules governing when courts should defer to administrative agencies reflect limits on judicial authority to supervise agency policymaking that are imposed by Congress and the separation of powers. See *INS* v. *Ventura*, 537 U.S. 12, 16 (2002); *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 866 (1984); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). Those limits are not relevant to when courts should defer to administrators in interpreting ERISA plans. The relevant guides

Petitioners' concerns about the court of appeals' decision are based on a misunderstanding of its scope. The court did not adopt a "hair-trigger" rule requiring de novo benefits determinations whenever administrators misconstrue plan terms or otherwise make "good-faith mistakes." Pet. Br. 48. Notably, the court did not disturb its holding in *Miller* v. *United Welfare Fund*, 72 F.3d 1066, 1071-1072 (2d Cir. 1995), that when a court concludes that an administrator has abused his discretion in denying a benefits claim, the court should normally remand to allow the administrator to consider additional evidence that might justify the denial. Instead, the court of appeals explained that *Miller* was not relevant here because there was no prospect of additional fact-finding on remand. Pet. App. 12a. The court also did not hold that an administrator who abuses his discretion in construing some plan terms should receive no deference in construing different plan terms. Instead, the court of appeals held only that deference is not required "where the administrator had previously construed the same terms and [the court] found such a construction to have violated ERISA." *Id.* at 13a.[6] And the absence of a requirement that courts defer is not equivalent to a prohibition on their doing so: even when the administrator has previously abused his discretion,

---

are trust law and ERISA's purposes, both of which support the decision below.

[6] Petitioners are thus incorrect in contending (Br. 48) that the decision below is inconsistent with cases holding that administrators should be given discretion to interpret plan terms that they have not previously misinterpreted. See, *e.g.*, *Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353, 1353-1354 (11th Cir. 2008); *Pakovich* v. *Broadspire Servs., Inc.*, 535 F.3d 601, 606 (7th Cir. 2008); *Vizcaino* v. *Microsoft Corp.*, 120 F.3d 1006, 1013 (9th Cir. 1997) (en banc).

a court may choose to accord deference to his later interpretation of plan terms.

D. The Administrators Were Not Entitled To Deference

1. Applying the appropriate principles, the court of appeals correctly sustained the district court's determination not to defer to the administrators' new position on remand that the pre-1998 plan terms, including the non-duplication-of-benefits provision, should be read to provide for use of the appreciated-offset method in calculating respondents' benefits. Deference was not required because, as the court of appeals held, the administrators "had previously construed the same terms and [the court] found such a construction to have violated ERISA." Pet. App. 13a.

Petitioners' contention (Br. 50-51) that they were not interpreting the same terms is incorrect. As an initial matter, the court of appeals concluded that they were, and petitioners offer no reason for this Court to second-guess that fact-based conclusion. In any event, that conclusion is correct. Contrary to petitioners' assertion (Br. 50), they defended their initial benefits determination in both the district court and the court of appeals by arguing that they could interpret the pre-1998 plan terms, including the non-duplication-of-benefits provision, to authorize use of the phantom account. See Pet. App. 40a, 42a, 83a-86a. And the court of appeals rejected that precise argument, holding that "the Plan administrator's conclusion that the Plan has always included the phantom account is unreasonable," even under "an arbitrary or capricious standard," *id.* at 44a.

Petitioners are also mistaken in suggesting that their fallback interpretation of the pre-1998 plan terms was owed deference because the defect in their initial

interpretation was merely "technical," Pet. Supp. Br. 1, or a minor good-faith mistake, Pet. Br. 46. The court of appeals held not only that petitioners' initial interpretation was unreasonable but also that their efforts to implement that interpretation violated the notice requirements in 29 U.S.C. 1022 and 29 U.S.C. 1054(h) (2000) and the anti-cutback provision in 29 U.S.C. 1054(g) (2000). Pet. App. 43a-51a. Those were serious violations of important requirements enacted to further "ERISA's central goals" of ensuring that beneficiaries are fully informed of their "rights and obligations" under benefits plans, *Curtiss-Wright Corp.*, 514 U.S. at 83, and that they receive the pension benefits that they have been promised, see *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 (1985).

2. The lower courts had an additional reason not to defer to the administrators on remand: using the administrators' proposed appreciated-offset method would have violated ERISA. In concluding that use of the phantom account violated ERISA's SPD requirement, the court of appeals had held that the pre-1998 Plan failed to provide adequate notice to rehired participants "that their future benefits would be offset by an appreciated value of their prior lump-sum distributions." Pet. App. 43a-44a (citation omitted). As the district court recognized (*id.* at 104a), interpreting the Plan to provide for the administrators' appreciated-offset method would have posed the same notice problem that the court of appeals had already identified because, like the phantom account, that method provided for an offset of an "appreciated value" of the prior distributions. In addition, although the district court did not rely on the point, and it is unclear whether the remand would have allowed it to do so, compare Pet. App. 40a n.10 with Pet.

App. 51a-52a, 60a, using the appreciated-offset method also would have violated ERISA's substantive requirements because that method reintroduced the original phantom-account method for benefits accruing after 1998. As the Ninth Circuit correctly held in *Miller* v. *Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871, 875-876 (2006), cert. denied, 549 U.S. 1280 (2007), the phantom-account method violates 29 U.S.C. 1054(c)(3) because it offsets employees' defined benefits by more than an actuarial equivalent of their prior distributions. See also Rev. Rul. 76-259, 1976-2 C.B. 111.

Accordingly, the court of appeals correctly held that the district court was not required to defer to the administrators' appreciated-offset method.[7]

II. THE COURT OF APPEALS CORRECTLY UPHELD THE DISTRICT COURT'S CHOICE OF REMEDY UNDER AN ABUSE-OF-DISCRETION STANDARD

Because the court of appeals held in its initial decision that the administrators had abused their discretion and violated ERISA, the district court had discretion to formulate a remedy. When selecting that remedy, the court appropriately applied equitable principles in a manner that was consistent with the terms of the Plan. Accordingly, the court of appeals properly reviewed the district court's decision for abuse of discretion.

---

[7] When, unlike in this case, the requisite notice is provided and the actuarial assumptions are reasonable (see 26 C.F.R. 1.411(a)-4(a)), ERISA permits floor-offset arrangements to make actuarial adjustments when calculating the offset for prior distributions. Indeed, the Internal Revenue Service and Treasury Department inform us that plans typically calculate the offset in that way.

A. A District Court's Choice Of Remedy For An ERISA Violation Is Reviewed For Abuse Of Discretion Unless The Court Is Interpreting Plan Terms

When a court has determined that an administrator's denial of benefits was arbitrary and capricious or otherwise violated ERISA, the district court's choice of equitable remedy is reviewed for abuse of discretion. See, *e.g.*, *Cook* v. *Liberty Life Assurance Co.*, 320 F.3d 11, 18 (1st Cir. 2003); *Zervos* v. *Verizon N.Y., Inc.*, 277 F.3d 635, 646 (2d Cir. 2002); *Grosz-Salomon* v. *Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1158 (9th Cir. 2001); *Halpin* v. *W.W. Grainger, Inc.*, 962 F.2d 685, 697 (7th Cir. 1992); *Grossmuller* v. *UAW, Local 813*, 715 F.2d 853, 859 (3d Cir. 1983). That rule accords with trust law, under which appellate courts generally review a lower court's application of equitable principles and choice of equitable remedy for abuse of discretion. See, *e.g.*, *United States* v. *Andrews*, 530 F.3d 1232, 1238 (10th Cir. 2008); *Burkhart Grob Luft und Raumfahrt GmbH & Co. KG* v. *E-Sys., Inc.*, 257 F.3d 461, 469 (5th Cir. 2001).

At the same time, courts of appeals generally apply de novo review to a district court's interpretation of plan terms. See, *e.g.*, *Brubaker* v. *Metropolitan Life Ins. Co.*, 482 F.3d 586, 589 (D.C. Cir. 2007). That de novo review applies to plan interpretation even if an appellate court is reviewing a district court's remedial decision. See, *e.g.*, *Yolton* v. *El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 577, 584 (6th Cir.), cert. denied, 549 U.S. 1019 (2006). The district court's remedial discretion does not generally extend to plan interpretation, which is ordinarily a question of law, because the court "would necessarily abuse its discretion if it based its ruling on an erroneous

view of the law." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

B. The District Court's Choice Of Remedy Was Based On Equitable Principles

The court of appeals properly reviewed the district court's remedial decision on remand for abuse of discretion because the district court was relying on equitable principles and not on a methodology that was dictated by plan terms. As the district court noted (Pet. App. 103a), its reliance on equitable principles accorded with the instructions that the court of appeals gave in remanding the case after finding that the administrators had violated ERISA. The court of appeals instructed the district court to "utilize an appropriate pre[-1998]-amendment calculation to determine [respondents'] benefits" and suggested that the court "may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." *Id.* at 51a.

The district court's use of such equitable principles on remand was entirely appropriate. The court could not have relied on plan terms to calculate the offset for respondents' prior distributions because the Plan did not address that issue with sufficient clarity. The court of appeals had concluded that pre-1998 plan terms "did not specify how the Plan would account for the prior distributions." Pet. App. 28a-29a. And the court of appeals had further held that, given the lack of clarity in the Plan and the SPD, use of the phantom account to calculate the offset violated ERISA, because the Plan failed to provide notice to rehired employees that an appreciated offset would be used. *Id.* at 43a. After reviewing the pre-1998 Plan on remand, the district court

agreed that "virtually nothing is set forth in either the Plan or the SPD" on how to calculate the offset for the prior distributions. *Id.* at 104a. The court also correctly concluded that suggested interpretations of the Plan (such as the administrators' proposed appreciated-offset method) that would offset an appreciated amount of the distributions would violate ERISA's notice requirements for the same reason that the court of appeals had held that the phantom account did. *Ibid.* As the court explained, "[i]f the employee had no notice of the 'phantom account,' he also had no notice" of those "other mechanisms" for calculating the offset. *Ibid.* Because reliance on such an interpretation of the Plan's general terms to calculate the offset would have violated ERISA's notice requirements, the district court instead properly relied on equitable principles to determine the appropriate offset, consistent with the general terms of the Plan as written.

Petitioners contend that the Plan was "not silent" but merely "ambiguous" about how to calculate the offset. Br. 52 (quoting Pet. App. 51a). But whether the Plan is best described as silent or ambiguous is beside the point. Even if the provisions cobbled together by petitioners (Br. 59-60) could somehow be read to provide for the administrators' appreciated-offset method, neither those terms nor the SPD provided notice "in a manner calculated to be understood by the average participant," 29 U.S.C. 1022, that respondents' benefits would be offset by that "appreciated value" of their prior distributions. Pet. App. 43a-44a (citation omitted). Under the court of appeals' prior decision, petitioners' reading of the Plan would have imposed an appreciated offset without adequate notice. ERISA therefore did

not permit, much less require, adoption of petitioners' interpretation.

Petitioners (Br. 55) further contend that the district court must have interpreted plan terms on remand because it awarded relief under 29 U.S.C. 1132(a)(1)(B). See also Business Roundtable Amicus Br. 15-25. That contention is incorrect. Section 1132(a)(1)(B) authorizes a participant to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. 1132(a)(1)(B). In determining whether a right exists under the terms of the plan, a court must consider not only the plan's written terms, but also the requirements of ERISA. See 29 U.S.C. 1104(a)(1)(D) (plan fiduciary must "discharge his duties * * * in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of*" Title I of ERISA) (emphasis added). ERISA thus in effect adds mandatory terms to plans and overrides any plan terms that are inconsistent with its requirements. See, *e.g.*, *Central Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739, 750 (2004).

Accordingly, in an action for benefits under 29 U.S.C. 1132(a)(1)(B), a court must not only interpret the terms of the plan, but also must determine whether those provisions are consistent with ERISA's requirements and disregard any terms that are inconsistent. When ERISA requires a court to reject an interpretation of plan terms, and the remaining terms do not yield a precise calculation of benefits, the court must use its equitable authority to craft a remedy that provides participants with the appropriate benefits, consistent with the general terms of the plan and considerations such as

the reasonable expectations of the parties. That is what the district court did here. The court concluded that, to the extent plan terms could be interpreted to provide for the offset of an appreciated value of respondents' prior distributions, that interpretation would violate ERISA's notice requirements. See Pet. App. 104a. Accordingly, the court, based on equitable principles, selected an offset methodology that did not have that defect but nonetheless was consistent with the general parameters of the Plan. See *id.* at 107a.

The district court's determination resembles other instances in which courts invoke equitable powers to remedy infirmities in trusts and contracts, such as cy pres and equitable reformation. See, *e.g.*, 2 Second Restatement § 399, at 297; 1 Restatement (Second) of Contracts § 155, at 406 (1981). Just as appellate courts apply deferential review to a lower court's choice of cy pres remedy or its decision to apply equitable reformation, see, *e.g.*, *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002); *LPN Trust* v. *Farrar Outdoor Adver., Inc.*, 552 N.W.2d 796, 799 (S.D. 1996), so too the court of appeals appropriately reviewed the district court's choice of offset methodology for abuse of discretion.

C. The District Court Did Not Abuse Its Discretion

The district court acted within its discretion in reducing respondents' benefits by only the actual amount of their prior distributions. The court reasonably concluded that offsetting only the actual distributions "most clearly reflects what a reasonable employee would have anticipated." Pet. App. 107a. Indeed, the court of appeals had reached the same conclusion in its initial opinion. *Id.* at 47a (stating that "rehired employ-

ees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received"). In adopting this approach, the district court acted consistently with plan terms, which entitled rehired employees to a benefit based on total years of employment, J.A. 24a-25a, 29a-31a; Pet. App. 25a-26a, but provided for some offset of prior distributions, J.A. 32a; Pet. App. 26a-28a, 106a. And the court acted consistently with the requirement in 29 U.S.C. 1104(a)(1)(D) that plan terms must comply with ERISA, because the court refused to rely on plan interpretations that would have violated ERISA's notice requirements.

Contrary to petitioners' contention (Br. 61), the district court's approach did not give rehired employees a windfall, because it reflected what the court reasonably found that they expected in light of the promises they had been given and the information they had received. In that regard, petitioners incorrectly assert (*ibid.*) that respondent Clair stated that he did not expect a benefit as large as the one provided by the district court's approach. Clair actually stated that he believed that offsetting only his prior distribution was appropriate because he had been promised a credit for all of his prior service. J.A. 126a.

Petitioners also err in asserting that the district court's approach is "economically irrational and unfair" to other employees. Br. 60. A face-value offset is not economically irrational. An employer could reasonably decide to offset only the face amount of prior distributions in order to encourage former employees with a high skill set to return to the company. Nor is giving former employees an incentive to return unfair to other employees. Former employees who are persuaded to

return are not similarly situated to either employees who never left (and therefore did not need to be enticed back) or newly-hired employees (who lack comparable experience).

Petitioners are likewise incorrect in suggesting (Br. 61-62) that the district court's approach violated tax-law or ERISA requirements. Contrary to petitioners' implication, Revenue Ruling 76-259, which states that floor-offset arrangements may be permissible under ERISA, does not require an offset of the full actuarial equivalent of prior distributions from profit sharing plans. On the contrary, that ruling states that floor-offset arrangements are permitted to provide for an offset of "only a specified portion of the vested account balance" in such plans. 1976-2 C.B. at 111. Nor does 26 C.F.R. 1.401(a)(4)-8(d)(1)(i) require an actuarially-adjusted offset. That regulation provides a safe harbor under which plans can be certain that they satisfy the Internal Revenue Code's prohibition against discrimination in favor of highly-compensated employees. The regulation does not require use of the safe harbor. In any event, the regulation does not limit the safe harbor to plans that provide an offset for the full actuarial equivalent of prior distributions. Instead, it states that plans will not qualify for the safe harbor if they offset more than "the actuarial equivalent of all or part of any prior distributions" attributable to employer contributions. 26 C.F.R. 1.401(a)(4)-8(d)(1)(i).

Indeed, regardless of the standard of review that applies to the district court's decision, the court was correct to reject the administrators' appreciated-offset approach. In most cases, that approach would have given rehired employees lower benefits than newly-hired employees. See J.A. 142a-143a. It therefore

would have treated rehired employees "as if they owed the [P]lan benefits upon rehire" even though "they were not informed of that situation" when they accepted reemployment. J.A. 99a. In addition, as noted above, interpreting the Plan as providing for use of the appreciated-offset approach would have violated ERISA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General

DEBORAH GREENFIELD
Acting Deputy Solicitor
TIMOTHY D. HAUSER
Associate Solicitor
ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
EDWARD D. SIEGER
Attorney
Department of Labor

NOVEMBER 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
NOV 20 2009
OFFICE OF THE CLERK

(14)

No. 08-810

IN THE
Supreme Court of The United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,
Petitioners,

v.

PAUL J. FROMMERT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENTS

MARY ELLEN SIGNORILLE
**Counsel of Record*
AARP FOUNDATION LITIGATION

MELVIN R. RADOWITZ
AARP

601 E Street, NW
Washington, DC 20049
Telephone (202) 434-2060
msignorille@aarp.org
Counsel for *Amicus Curiae* AARP

November 20, 2009

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. CONGRESS INTENDED ERISA TO PROTECT PROMISES OF PENSION BENEFITS SO EMPLOYEES COULD PLAN FOR THEIR RETIREMENT 4

II. IN DETERMINING WHETHER TO RETURN TO WORK FOR A FORMER EMPLOYER, EMPLOYEES CONSIDER THE EMPLOYER'S TOTAL COMPENSATION PACKAGE, INCLUDING BENEFITS 6

A. Employers Provide Benefits As Part Of A Total Compensation Package In Order To Remain Competitive In Recruitment And Retention Of Employees In Their Particular Market Segment 6

B. When Employers Rehire Former Employees, There Are Advantages To Both Employers And Employees 10

1. Employers rehire former employees because they possess known skills, fit the company culture and are less risky to hire than new employees 10

2. Individuals generally stay in the work force and return to work after retirement for financial reasons 12

III. BY DISTORTING THE TERMS OF THE BARGAIN BETWEEN EMPLOYER AND EMPLOYEE, XEROX IMPERMISSIBLY RECEIVED A WINDFALL BENEFIT 14

A. Due To Seemingly Favorable Rules In Its Pension Plan, Xerox Possessed A Competitive Advantage Over Rival Employers In The Labor Market With Respect To Attracting Its Former Employees 14

B. A Rational Former Employee Would Not Have Interpreted The Terms Of The Bargain With Xerox To Render Their Additional Benefit Accruals Nugatory 16

C. By Failing To Disclose The Revised "Administrator's Approach" To Reduce Employee's Benefits In The Plan, The Bargain Between Employer And Employee Was Distorted And Ultimately Conferred A Windfall On Xerox..... 18

CONCLUSION 21

TABLE OF AUTHORITIES

FEDERAL CASES

Aetna Health Inc. v. Davila,
542 U.S. 200 (2004) 2

Alessi v. Raybestos-Manhattan, Inc.,
451 U.S. 504 (1981) 19

Black & Decker Disability Plan v. Nord,
538 U.S. 822 (2003) 2

Central Laborers' Pension Fund v. Heinz,
541 U.S. 739 (2004) 4, 19

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 2

Frommert v. Conkright,
472 F.Supp.2d 452 (W.D.N.Y. 2007) 18

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002) 2

Hozier v. Midwest Fasteners, Inc.,
908 F.2d 1155 (3d Cir. 1990) 19

Int'l Bhd. of Teamsters v. Daniel,
439 U.S. 551 (1978) 6

Izzarelli v. Rexene Products Co.,
24 F.3d 1506 (5th Cir. 1994) 19

Lockheed Corp. v. Spink,
517 U.S. 882 (1996) 19

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) 2

Metro. Life Ins. Co. v. Glenn,
128 S. Ct. 2343 (2008) 2

Musmeci v. Schwegmann Giant Super Markets,
159 F.Supp.2d 329 (E.D. La. 2001) 5

Nachman Corp. v. Pension Ben. Guar. Corp.,
446 U.S. 359 (1980) 4, 19

Varity Corp. v. Howe,
516 U.S. 489 (1996) 4

FEDERAL STATUTES

Employee Retirement Income Security Act (ERISA),
29 U.S.C. § 1001 *et seq*. 1

§ 2(a), 29 U.S.C. § 1001 *et seq*. 4
§ 204(h), 29 U.S.C. § 1054(h) 19
§ 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) 1

Internal Revenue Code (IRC),
§ 62(a)(6) 7
§ 401(a) 7
§ 404(a) 7

MISCELLANEOUS

AMERICAN HERITAGE DICTIONARY (4th ed. 2000)..... 17

S. Groeneman, *Staying Ahead Of The Curve 2007: The AARP Work And Career Study* (2008), *available at* http://www.aarp.org/research/surveys/stats/surveys/public/articles/2007_Staying_Ahead_of_the_Curve.html 13

S. K. Brown, *Attitudes Of Individuals 50 And Older Toward Phased Retirement* (July 2005), *available at* http://assets.aarp.org/rgcenter/post-import/phased_ret.pdf..... 13

S. K. Brown, *Staying Ahead Of The Curve 2003: The AARP Working in Retirement Study* (2003), *available at* http://www.aarp.org/research/surveys /stats/surveys /public/articles/aresearch-import-417.html..... 13

R. Helman, M. Greenwald & Assoc., C. Copeland & J. VanDerhei , Employee Benefits Research Inst., *The 2009 Retirement Confidence Survey: Economy Drives Confidence to Record Lows; Many Looking to Work Longer* at (EBRI ISSUE BRIEF NO. 328 Apr. 2009) ... 13, 14

R. Korobkin & T. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics,* 88 CAL. L. REV. 1051 (July 2000)..... 14, 16, 19

A. M. Lofaso, *Toward A Foundational Theory of Workers' Rights: The Autonomous Dignified Worker,* 76 UMKC L. REV. 1 (Fall 2007)..... 6, 7, 18

A. Lusardi, *Financial Literacy: An Essential Tool for Informed Consumer Choice?* (June 2008) *available at* www.dartmouth.edu/~alusardi/ Papers/ Lusardi_Informed_Consumer.pdf..... 17

G. McClure, ieee-usatoday's engineer online, *Phased Retirement — The Time Has Come* (Aug. 2008), *available at,* http://www.todaysengineer.org/2008/Aug/phased_retirement.asp..... 11

Gordon B. T. Mermin, The Urban Institute, *Typical Wealth Held by Those at the Verge of Retirement* (Mar. 2008), *available at* http://www.urban.org/UploadedPDF/411618_typical_wealth.pdf..... 5

Metlife, *Sixth Annual Study of Employee Benefits Trends: Findings from the National Survey of Employers and Employees* (2008)..... 8, 9

A.H. Munnell, A. Webb & F. Golub-Sass, *The National Retirement Risk Index: After The Crash* (IB # 9-22 Oct. 2009), *available at* http://crr.bc.edu/briefs/the_national_retirement_risk_index_after_the_crash.html 5, 13

OI Partners, *40% of Employers Plan to Rehire Some Some Workers They Laid Off, OI Partners Survey Finds* (Sept. 14, 2009), *available at* http://www.oipartners.net/news/pr_archived/pr_sep142009(2).html 11

D. Parkinson, The Conference Board, *Voices of Experience: Mature Workers in the Future Workforce* (2002) 11, 12, 13

RESTATEMENT SECOND OF CONTRACTS (1981)..... 17

S.J. Sacher, *et al.*, EMPLOYEE BENEFITS LAW (2d ed. 2000) 7

Lorraine A. Schmall, *Keeping Employer Promises when Relational Incentives No Longer Pertain: "Right-sizing" and Employee Benefits*, 68 GEO. WASH. L. REV. 276 (2000)..... 8

Society for Human Resource Management, *2009 Employee Benefits: Examining Employee Benefits in a Fiscally Challenging Economy* (June 2009), *available at* http://www.shrm.org/Research/SurveyFindings/Articles/Pages/2009EmployeeBenefitsSurveyReport.aspx 7

STEVEN A. NYCE & SYLVESTER J. SCHIEBER, THE ECONOMIC IMPLICATIONS OF AGING SOCIETIES (2005) 10

U.S. DEP'T OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON AGING, A PROFILE OF OLDER AMERICANS: 2008 (2008), *available at* http://www.aoa.gov/AoARoot/Aging_Statistics/Profile/2008/docs/2008profile.doc 12

Watson Wyatt Worldwide, *Insider, How Do Retirement Plans Affect Employee Behavior?* (April 2005), *available at* http://www.watsonwyatt.com/us/pubs/Insider/showarticle.asp?ArticleID=14596 ..... 8, 9

L. Wolgemuth, Many Employers May Rehire Workers They Laid Off (Sept. 16, 2009), *available at* http://www.usnews.com/money/blogs/the-inside-job/2009/9/16/many-employers-may-rehire-laid-off-workers.html 12

Xerox, *Benefits for Salaried Employees: Overview for Employees Who Join the Company As A Result of Merger or Acquisition* (Jan. 2009), *available at* www.xerox.com/downloads/usa/en/b/Benefits_Overview_M_A.pdf 12

Xerox, U.S. Careers, http://xeroxcareers.com/working-xerox/benefits.aspx 9

INTEREST OF *AMICUS CURIAE*[1]

With nearly 40 million members, AARP is the largest nonpartisan, nonprofit organization representing the interests of people age 50 and older. AARP helps people over age 50 have independence, choice and control in ways that are beneficial and affordable to them and society. Nearly half of the members are employed full or part-time, with many working for employers which provide health, pension and disability benefit plans covered by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*

Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pensions, health, and other employee benefits.[2]

---

[1] Counsel for AARP states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

[2] As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as *amicus curiae* in numerous cases involving the appropriate standard of judicial review of plan administrators' benefit eligibility determinations under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), ERISA's benefit claims process, and the scope of remedies available under

Given the exclusivity of ERISA's civil enforcement provisions for participants in employee benefit plans, see *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004), it is imperative that participants have meaningful recourse under ERISA to protect and enforce their rights under such plans. The issues in this case directly bear on a court's authority to remedy a violation of ERISA where a plan administrator's denial of a benefit has been found to be an abuse of discretion. Thus, resolution of the issues in this case will have a significant impact on the integrity of the administration of employee benefit plans and individual participants' abilities to obtain those benefits which will foster their economic security. In light of the significance of the issues presented by this case, AARP respectfully submits this brief *amicus curiae* to facilitate a full consideration by the Court of these issues.

SUMMARY OF ARGUMENT

Failure to provide individuals complete and accurate information concerning the actual retirement benefit to which they are entitled, regardless of the reasons for the failure, prevents individuals from meaningfully determining their financial needs for retirement as Congress intended. The long-term effect of an employer reneging on its benefit promise wreaks

---

ERISA's civil enforcement provisions. *See, e.g., Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

havoc on the individual since retirement occurs at an age where employees do not have time to make up their losses.

Because Xerox had an interest in rehiring former employees and because former employees had a financial interest in returning to work, Xerox had a considerable interest in ensuring that the bargain and exchange over salaries and benefits served to incentivize former employees to return to Xerox. Moreover, because of the importance of pension benefits to this exchange, particularly for employees approaching retirement, Xerox's ability to remain competitive in the labor market regarding former employees who possessed valuable skills rested in large part on the pension benefits that employees perceived they would earn if they returned to work for Xerox. Returning to Xerox was more attractive than working at a rival employer because the employees in this case were already vested in their pensions and would accrue benefits at a higher rate. However, by failing to disclose the revised "administrator's approach" to reduce employee's benefits in the plan, the bargain between employer and employee was distorted and ultimately conferred a windfall on Xerox.

ARGUMENT

I. CONGRESS INTENDED ERISA TO PROTECT PROMISES OF PENSION BENEFITS SO EMPLOYEES COULD PLAN FOR THEIR RETIREMENT.

More than a decade after this Court decided that improper disclosures in an employee benefit plan could give rise to a breach of fiduciary duty claim, *Varity Corp. v. Howe*, 516 U.S. 489 (1996), and more than five years after this Court recognized a change in plan provisions could not affect pension benefits that were already earned, *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004), the Court gets to determine, yet again, the relationship between changes in plan provisions, improper disclosures about those changes, and the impact on an employee's benefits.

One of Congress's primary focuses in enacting ERISA was to hold employers accountable for the benefits they promise to their employees to ensure that employees can safely rely on such promises in their retirement planning. This type of accountability is central to ERISA's primary goal of protecting employees' benefits. *See Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 374-75 (1980) (purpose of ERISA was to prevent the "great personal tragedy" suffered by employees whose retirement benefits were not paid); *see generally* ERISA § 2(a), 29 U.S.C. § 1001(a). When an employer fails to pay the pension benefits expected at retirement, it wreaks financial havoc upon employees and their family by destroying a

lifetime of planning for their retirement years. Retirement typically occurs at an age where employees no longer have the option or the time to start all over again in hopes of obtaining a new pension. The long-term effect of an employer reneging on its benefit promise is potentially devastating and emotionally shattering for employees and their families. *See generally Musmeci v. Schwegmann Giant Super Markets*, 159 F.Supp.2d 329 (E.D. La. 2001).

For many people, outside of Social Security, employee benefit plans are the main source of retirement assets.[3] As longevity, and thus the amount of assets needed to live comfortably in retirement, increases,[4] retirement planning becomes even more important. Failure to provide individuals complete and accurate information concerning the actual retirement benefit to which they are entitled, regardless of the reasons for the failure, prevents

---

[3] While defined contribution plans have largely replaced traditional pensions for many younger workers in the private sector, traditional pensions are still the more important source of wealth for middle-quintile households near retirement today. Gordon B. T. Mermin, The Urban Institute, *Typical Wealth Held by Those at the Verge of Retirement* (Mar. 2008), *available at* http://www.urban.org/UploadedPDF/411618_typical_wealth.pdf.

[4] A.H. Munnell, A. Webb & F. Golub-Sass, *The National Retirement Risk Index: After The Crash* 1, 2, 6 (IB # 9-22 Oct. 2009), *available at* http://crr.bc.edu/briefs/the_national_retirement_risk_index_ after_the_crash.html (between 2004 to 2009, the percent of households who are at risk of being unable to maintain their standard of living in retirement increased from 43% to 51%).

individuals from meaningfully determining their financial needs for retirement as Congress intended.

II. IN DETERMINING WHETHER TO RETURN TO WORK FOR A FORMER EMPLOYER, EMPLOYEES CONSIDER THE EMPLOYER'S TOTAL COMPENSATION PACKAGE, INCLUDING BENEFITS.

A. Employers Provide Benefits As Part Of A Total Compensation Package In Order To Remain Competitive In Recruitment And Retention Of Employees In Their Particular Market Segment.

An employer receives the ability to operate its business with the benefit of an employee's labor in exchange for paying that employee a salary and other benefits. *See generally* A. M. Lofaso, *Toward A Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1 (Fall 2007). The benefits exchanged for the employee's labor may include pension benefits. However, it is impossible to determine definitely what portion of the employee's labor, and hence the value to the employer, is attributable to pension benefits alone. *Cf. Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 560 (1978) ("Only in the most abstract sense may it be said that an employee "exchanges" some portion of his labor in return for these possible benefits. He surrenders his labor as a whole . . .").

Offering and accepting fringe benefits in lieu of additional wages is rational for both parties to the exchange. It is rational for employers to provide fringe benefits in lieu of additional salary because employers receive a greater return on their expenditure due to tax savings. *See Lofaso,* at 1; IRC §§ 401(a) & 404(a) (permitting employer deduction for retirement plan contribution); *see generally* S.J. Sacher, *et al.*, EMPLOYEE BENEFITS LAW at 171 (2d ed. 2000) (explaining tax benefits of qualified pension plans). Similarly, because many fringe benefits receive favorable income tax treatment, IRC § 62(a)(6) (individual does not pay taxes on retirement monies until received), the rational employee may be willing to accept a lower annual salary in exchange for additional fringe benefits with the idea that total compensation will be maximized. *See* Lofaso, at 9.

It is also rational for employers to provide fringe benefits, particularly pension benefits, in lieu of additional salary in order to stay competitive in the labor market. *See* J.A. at 45a (Xerox's recognition of its benefits package making it more competitive). Employees who believe they have competitive benefit packages tend to remain with their employers. *See* Society for Human Resource Management, *2009 Employee Benefits: Examining Employee Benefits in a Fiscally Challenging Economy* at 8, 19-20, 23-242 (June 2009), *available at* http://www.shrm.org/Research/SurveyFindings/Articles/Pages/2009EmployeeBenefitsSurveyReport.aspx (concluding that "[e]mployees consistently rate benefits as one of the key factors in employee job satisfaction. It is important for an employee benefits package to be attractive to both

current and prospective employees . . . ."). Moreover, almost three-quarters of employees surveyed believed that retirement benefits were important factors to generate employee loyalty, behind salary and health benefits. MetLife, *Sixth Annual Study of Employee Benefits Trends: Findings from the National Survey of Employers and Employees* at 8, 28 (2008) (hereinafter *Sixth Annual Study*). For employers with over 10,000 employees, like Xerox, the percentage of employees who feel retirement benefits affect their loyalty rises to 84%. *Id.* at 29. As the demographics of this country change, employees are focusing more on retirement issues. MetLife's survey recognizes the use of retirement benefits as a way "to meet employee needs and also retain workers . . . ." *Id.* at 10. Consequently, in return for offering pension benefits, the employer obtains lower employee turnover, which reduces costs and improves productivity. *See* Watson Wyatt Worldwide, *Insider, How Do Retirement Plans Affect Employee Behavior?* at 1 (April 2005), *available at* http://www.watsonwyatt.com/us/pubs/Insider/show article .asp?ArticleID=14596.

Of course pension benefits also play a critical role in an employer's ability to recruit and manage a high quality workforce. Lorraine A. Schmall, *Keeping Employer Promises when Relational Incentives No Longer Pertain: "Right-sizing" and Employee Benefits*, 68 GEO. WASH. L. REV. 276, 290 (2000) ("Because ERISA does not mandate that employers provide pensions to its employees, it must be that employers use pensions as personnel devices that alter quit and hiring decisions.'"); *see* Watson Wyatt, at 1. An employer's benefit package is an important reason

employees decide to join an employer in the first instance and to stay with that employer. *See Sixth Annual Study, supra*, at 25-28; Watson Wyatt, *supra* at 4-5. Thus, a large majority of employers provide some type of retirement plan, with almost 30% still offering a defined benefit plan in 2009.

Xerox clearly recognizes this paradigm and the importance of benefits as shown by its website where the first link under "Working at Xerox" is a link to a description of the available employee benefits. Xerox, U.S. Careers, http://xeroxcareers.com/working-xerox/benefits.aspx. Xerox clearly also recognized the importance of benefits as a recruiting tool for employees in its summary plan descriptions that acknowledged "the 1989 changes in the retirement program . . . have improved the ranking of the Xerox plans" measured against those companies that recruit from the same labor pool such as "Kodak, IBM, Digital Equipment, Hewlett-Packard, and AT&T. . . ." J.A. at 45a.

B. When Employers Rehire Former Employees, There Are Advantages To Both Employers And Employees.

1. Employers rehire former employees because they possess known skills, fit the company culture and are less risky to hire than new employees.

Attracting and retaining workers possessing critical skills will be one of the most difficult challenges that businesses will face in the coming decades because, as baby boomers begin to approach retirement age, there will be inadequate numbers of educated workers to fill those positions necessary to successfully sustain business operations.[5] In companies where older workers have skill, expertise, and organizational memory, their continued employment can contribute to business success.

Some industries have already started to institute new strategies to deal with the potential labor shortage. Some employers have begun to

---

[5] Current labor force participation patterns over the last few decades were the result of increased fertility after World War II resulting in the age cohort known as the "baby boomers" as well as the large number of women who entered, and remained in, the workforce. For numerous reasons, the labor pools in the subsequent age cohorts are substantially smaller than the "baby boom" cohort. *See generally* STEVEN A. NYCE & SYLVESTER J. SCHIEBER, THE ECONOMIC IMPLICATIONS OF AGING SOCIETIES 1-7 (2005).

encourage employees to work longer – that is, beyond the traditional retirement age for that company. Others have instituted phased retirement or flexible work programs.[6] Some employers have rehired employees either as consultants, employees, or other professionals.

Employers who rehire former employees do so for numerous reasons. These reasons include the employer's familiarity with the employees' skills; the employees' knowledge of the actual jobs for which they are hired; the employees' knowledge of, and ability to fit within, the company's culture and environment; a shortage of employees who can fill a specialty expertise, are good managers, or generally are qualified; and less cost and risk than hiring new workers.[7] *See* OI Partners, *40% of Employers Plan to Rehire Some Workers They Laid Off, OI Partners Survey Finds* (Sept. 14, 2009), *available at* http://www.oipartners.net/news/pr_archived/pr_

---

[6] For example, it is estimated that approximately 46 percent of all engineering jobs in the electric and gas utility industries could become vacant by 2012, due to retirement and other forms of attrition. Phased retirement of senior engineers could preserve their intellectual capital for the industry and provide support to junior engineers. G. McClure, ieee-usatoday's engineer online, *Phased Retirement — The Time Has Come* (Aug. 2008), *available at* http://www.todaysengineer.org/2008/Aug/phased_retirement.asp.

[7] For similar reasons, if employees have a choice, they would prefer to work reduced hours for the same company with the same benefits (68%) as full-time workers compared with working reduced hours for another company with benefits (8%). D. Parkinson, The Conference Board, *Voices of Experience: Mature Workers in the Future Workforce* at 22, 37, 45 (2002).

sep142009(2).html; L. Wolgemuth, Many Employers May Rehire Workers They Laid Off (Sept. 16, 2009), *available at* http://www.usnews.com/money/blogs/the-inside-job/2009/9/16/many-employers-may-rehire-laid-off-workers.html; D. Parkinson, The Conference Board, *Voices of Experience: Mature Workers in the Future Workforce* at 4, 8, 30, 57 (2002).

Like the employers in these surveys, Xerox clearly recognized the advantage of rehiring its former employees and frequently did so. *See, e.g.*, Xerox, *Benefits for Salaried Employees: Overview for Employees Who Join the Company As A Result of Merger or Acquisition* (Jan. 2009) (noting special provisions may apply to rehires), *available at* www.xerox.com/downloads/usa/en/b/Benefits_Overview_M_A.pdf.

2. Individuals Generally Stay in the Work Force and Return to Work After Retirement for Financial Reasons.

As a result of increases in longevity, an individual may spend more than twenty years in retirement. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON AGING, A PROFILE OF OLDER AMERICANS: 2008 at 1-2 (2008) (persons reaching age 65 have an average life expectancy of an additional 19.0 years), *available at* http://www.aoa.gov/AoARoot/Aging_Statistics/Profile/2008/docs/2008profile.doc. This results in individuals who retire at the current average age of retirement –

62 – needing more money to provide an adequate retirement.[8]

Although people stay in the work force or return to work for a variety of reasons, the primary motivating factor has consistently been financial.[9] S. Groeneman, *Staying Ahead Of The Curve 2007: The AARP Work And Career Study* at 8 (2008), *available at* http://www.aarp.org/research/surveys/stats/surveys/public/articles/2007_Staying_Ahead_of_the_Curve.html; S. K. Brown, *Attitudes Of Individuals 50 And Older Toward Phased Retirement* at 8 (July 2005), *available at* http://assets.aarp.org/rgcenter/post-import/phased_ret.pdf (hereinafter Attitudes of Individuals); S. K. Brown, *Staying Ahead Of The Curve 2003: The AARP Working in Retirement Study* at 4 (2003), *available at* http://www.aarp.org/research/surveys/stats/surveys/public/articles/aresearch-import-417.html; D. Parkinson, at 4, 30 (a majority of employees of 8 major pharmaceutical and service industry companies stated that they were staying in

---

[8] The median age for retirement is around age 62 or 63, with almost half of retirees saying they retired sooner than planned. *Compare* R. Helman, M. Greenwald & Assoc., C. Copeland & J. VanDerhei, Employee Benefits Research Inst., *The 2009 Retirement Confidence Survey: Economy Drives Confidence to Record Lows; Many Looking to Work Longer* at 1, 3, 5 (EBRI ISSUE BRIEF NO. 328 Apr. 2009) (hereinafter RCS 2009), *with* A.H. Munnell, A. Webb & F. Golub-Sass, *The National Retirement Risk Index: After The Crash* at 2 (IB # 9-22 Oct. 2009), *available at* http://crr.bc.edu/briefs/the_national_retirement_risk_index_after_the_crash.html.

[9] Since 1999 between one-quarter to one-third of retirees work in retirement, largely for financial reasons. *2009 RCS* at 15, 16.

the workforce for economic reasons). Indeed, in economically uncertain environments, such as the recent downturn, that often result in the declining value of retirement savings accounts and other investments, one of the few things individuals can control is the offering of their labor.[10]

III. BY DISTORTING THE TERMS OF THE BARGAIN BETWEEN EMPLOYER AND EMPLOYEE, XEROX IMPERMISSIBLY RECEIVED A WINDFALL BENEFIT.

A. Due To Seemingly Favorable Rules In Its Pension Plan, Xerox Possessed A Competitive Advantage Over Rival Employers In The Labor Market With Respect To Attracting Its Former Employees.

Because Xerox had an interest in rehiring former employees and because former employees had a financial interest in returning to work, *see* Section II. B, *supra*, Xerox has a considerable interest in ensuring that the bargain and exchange over salaries and benefits served to incentivize former employees to return to Xerox. *See* R. Korobkin & T. Ulen, *Law and Behavioral Science: Removing the Rationality*

---

[10] The recent economic downturn has only heightened employees' intent to delay retirement, to return to work, or work in retirement. More than a quarter of respondents stated that the age at which they expect to retire has changed; of these almost 90% said that they have postponed retirement with the intention of increasing their financial security. *Id.* at 1, 4, 14, 15, 16.

Assumption From Law and Economics, 88 CAL. L. REV. 1051, 1054 (July 2000) ("people respond to incentives"). Moreover, because of the importance of pension benefits to this exchange, particularly for employees approaching retirement, *see* Section II. A, *supra*, Xerox's ability to remain competitive in the labor market regarding former employees who possessed valuable skills rested in large part on the pension benefits that employees perceived they would earn if they returned to work for Xerox.

Xerox had a competitive advantage over rival employers with respect to former employees because, all aspects of the rival compensation packages being equal, employees would be able to return to Xerox having already attained a vested right to the pension benefits. Even after the employees consider that their ultimate pension benefit will be offset by the amount previously distributed when they first left Xerox, returning to Xerox was still more attractive than working at a rival employer because they were vested and would accrue benefits at a higher rate.

Given the heightened importance of compensation generally and retirement savings specifically, it is not surprising that Xerox was able to attract employees who previously had left Xerox and were subsequently reentering the workforce.

B. A Rational Former Employee Would Not Have Interpreted The Terms Of The Bargain With Xerox To Render Their Additional Benefit Accruals Nugatory.

Because the plan language was silent that, upon return, the employee's pension benefits would be dramatically reduced by virtue of the revised "Administrator's Approach," the bargain and exchange between employee and employer was distorted. Without accurate and complete disclosures as to an employer's benefit package, employees cannot make an informed decision as to whether to work for an employer. *See* Korobkin & Ulen, at 1064 ("actors should be able to compare the utility consequences of all alternatives to each other"). In this case, the average rational employee returning to work for Xerox would not have interpreted the plan to include the revised "Administrator's Approach" which resulted in basically eliminating any additional benefit accruals. After the 1989 plan revision, §9.6 of Xerox's plan merely stated that:

> In the event any part of or all of Member's accrued benefit is distributed to him prior to his Normal Retirement Date, . . . the accrued benefit of such Member based on all Years of Participation *shall be offset by the accrued benefit attributable to such distribution*.

F1A720. The Xerox plan did not further define

"offset." Because words of a contract are given their plain meaning unless they are defined in a different way, *see* RESTATEMENT SECOND OF CONTRACTS § 201 (1981) ("Unless a different intention is shown, language is interpreted in accordance with its generally prevailing meaning."); *id.* § 202(3), a reasonable employee would interpret "offset" according to its plain meaning of "counterbalance." *See* AMERICAN HERITAGE DICTIONARY at 1221 (4th ed. 2000).

Xerox essentially argues that it would be irrational for an employee not to expect "offset" to take into consideration the time value of money. But this premise is flawed. Although time value of money is a principle generally recognized among economists, it is not commonly understood among lay persons. *See* A. Lusardi, *Financial Literacy: An Essential Tool for Informed Consumer Choice?* at 2 (June 2008) (most individuals lack knowledge of basic financial concepts, such as the working of interest compounding and the difference between nominal and real values), *available at* www.dartmouth.edu/~alusardi/ Papers/ Lusardi_ Informed_Consumer.pdf. It would be unfair to judge the rationality of the average Xerox former employee based on knowledge of economic theory. When the average person reads "offset," they do not think of the time value of money. They merely think that the lump sum they previously received will be subtracted from the future amount to which they are entitled. It would be irrational to expect an employee to read "offset" to automatically infer that this means a process as complicated as the revised "Administrator's Approach." Although this revised Approach is one type of possible

offset, absent further explanation, it is far more rational to expect the employee to interpret "offset" as its more basic meaning. The district court recognized this when crafting its remedy upon remand, and applied this "nominal offset" because it "most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD." *Frommert v. Conkright*, 472 F.Supp.2d 452, 459 (W.D.N.Y. 2007).

Instead, Xerox's arguments amount to little more than an attempt to deflect from its own error in drafting plan language to blame the employee for not exercising his perfect rationality to assume that the plan means something other than what it in fact says.

C. By Failing To Disclose The Revised "Administrator's Approach" To Reduce Employee's Benefits In The Plan, The Bargain Between Employer And Employee Was Distorted And Ultimately Conferred A Windfall On Xerox.

Petitioners claim that the district court's nominal offset remedy "confers a windfall on Plan participants who left Xerox and returned at a later stage in their careers." (Pet'rs' Br. 3). However, in reality, imperfect information and an imbalance in bargaining power have conveyed a windfall on Xerox by allowing it to use a false competitive advantage to attract former employees, who only years later learn they will not receive the full benefit of their bargain. *See generally* Lofaso, at 9 (firms attempt to maximize

profits); Korobkin & Ulen, at 1064 (individuals must have complete and accurate information in order to make true comparisons and maximize their wealth). By using plan language that leaves potential employees with the perception that their total compensation will be higher than it is, Xerox was able to gain a competitive advantage in the labor market without assuming additional costs that would hurt its bottom line.

One of ERISA's primary functions, however, is to bar plan administrators from deception in order to gain bargaining power with employees who believe they are receiving a benefit that does not in fact exist. *See, e.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981) (a purpose of ERISA is to ensure "if a worker has been promised a defined benefit upon retirement . . . he actually receives it."); *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (a purpose of ERISA is "to ensure that employees will not be left empty handed once employers have guaranteed them certain benefits"); *see also Nachman Corp.*, 446 U.S. at 375. Despite the varying uses of benefit plans as personnel devices, plan sponsors do not have a completely unfettered right to amend their employee benefit plans: no substantive provision of ERISA may be violated, no express term of the plan's governing documents may be violated, and ERISA's procedures for adopting an amendment must be followed including appropriate and complete disclosures. *See* ERISA § 204(h), 29 U.S.C. § 1054(h); *Central Laborers' Pension Fund*, 541 U.S. 739 *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162

(3d Cir. 1990). In enacting these provisions, Congress balanced changes needed for financial reasons and for management of the work force with the impact on the individual.

Contrary to the intent of ERISA, Xerox has impermissibly achieved a windfall in the form of receiving the benefits of highly skilled former employees without having to pay them their true market value. Had these former employees known their pension payments would be gouged by the "Administrator's Approach" to eliminating accrued benefits, thus reducing the total value of their compensation package, they may not have decided to return to work at Xerox. It is highly likely that in most cases, the comparative advantage achieved by Xerox over rival employers due to crediting former employees with vesting and years of service was more than eroded by the revised "Administrator's Approach." Consequently, a rival employer offering an identical compensation package may have been more attractive to former employees, since their, albeit lower, gross pension benefit from the rival employer would result in a greater net pension benefit when considered in combination with the former lump sum payment from Xerox.

Finally, Xerox imposed high opportunity costs on these employees because between 1989 and 1996 – the year in which Mr. Frommert first received a Personal Statement indicating the full impact of Xerox's reduction scheme – these employees could have been working for another employer. In fact, in that amount of time, they would have worked long enough

to have become vested in an alternative pension plan. However, because the language of Xerox's Plan was silent and because these employees received annual reassurances from Xerox indicating that their retirement benefit would be adequate to ensure security in retirement, most employees did not seek out alternative employment opportunities and lost a significant amount of time in which to earn additional pension benefits at another employer.

CONCLUSION

For the foregoing reasons, AARP urges the Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

Mary Ellen Signorille
**Counsel of Record*
AARP Foundation Litigation

Melvin R. Radowitz
AARP

601 E Street NW
Washington, DC 20049
Telephone (202) 434-2060
Facsimile (202) 434-6424
msignorille@aarp.org
Counsel for *Amicus Curiae*
AARP

November 20, 2009

AMICUS CURIAE BRIEF

No. 08-810

In The
Supreme Court of the United States

SALLY L. CONKRIGHT, ET AL., AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* JANICE C. AMARA, GISELA R. BRODERICK, ANNETTE S. GLANZ, ET AL., AND THE PENSION RIGHTS CENTER IN SUPPORT OF RESPONDENTS

STEPHEN R. BRUCE
Counsel of Record
ALLISON C. PIENTA
805 15th St., NW, Suite 210
Washington, D.C. 20005
(202) 289-1117

Counsel for Amici Curiae

November 2009

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

BACKGROUND 3

SUMMARY OF ARGUMENT 7

ARGUMENT 12

I. The Second Circuit Properly Determined that the District Court Had Discretion to Craft a Remedy for the Identified Statutory Violations Without Deferring to a Post Hoc Proposal from the Party Who Violated the Law. 12

A. ERISA §§204(g) and (h) and This Court's Precedents Set Lower and Upper Limits on Remedies. 19

B. The Circuits Uniformly Hold that District Courts Are Not "Obligated to Defer" to Positions Advanced for the First Time in Litigation. 21

C. In Crafting Remedies, Judges and Juries Often Deal with Omitted Terms or Provisions that Statutory or Common Law Rules Have Invalidated. 24

D. Review of the District Court's Exercise of its Discretion in Crafting a Remedy Is Under an Abuse of Discretion Standard. . . . 28

II. The Second Circuit's Instructions to the District Court on How to Proceed on Remand and Its Review of the District Court's Decision Are Consistent With These Principles. 29

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

Albemarle Paper v. Moody, 422 U.S. 405 (1975) ... 20

BMW of N. America v. Gore, 517 U.S. 559 (1996) . 18

Bowen v. Georgetown University Hospital,
488 U.S. 204 (1988) 21

Bynum v. CIGNA Healthcare of N.C.,
287 F.3d 305 (4th Cir. 2002) 22

Central Laborers' Pension Fund v. Heinz,
541 U.S. 739 (2004) 3, 8, 14, 19

Central States Teamsters v. Central Transport,
472 U.S. 559 (1985) 11

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 14

Curtiss-Wright Corp. v. Schoonejongen,
514 U.S. 73 (1995) 8, 11, 26

Deak v. Masters Mates & Pilots Pension Plan,
821 F.2d 572 (11th Cir. 1987),
cert. denied, 484 U.S. 1005 (1988) 23

Dishman v. UNUM Life Insurance Co.,
269 F.3d 974 (9th Cir. 2001) 22

Donovan v. Bierwirth, 754 F.2d 1049 (2d Cir. 1985) 24

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 9, 12-13, 15, 27

Flinders v. Workforce Stabilization Plan, 491 F.3d 1180 (10th Cir. 2007) 22

Florence Nightingale Nursing Serv. v. Blue Cross/ Blue Shield of Ala., 41 F.3d 1476 (11th Cir.), cert. denied, 514 U.S. 1128 (1995) 27

Frommert v. Conkright (Frommert I), 433 F.3d Supp.2d 254 (2d Cir. 2006) ... *passim*

Frommert v. Conkright, 472 F.Supp.2d 452 (W.D.N.Y. 2007) 6, 10, 16, 28, 29

Frommert v. Conkright, 535 F.3d 111 (2d Cir. 2008) ..... *passim*

Glista v. UNUM Insurance Co., 378 F.3d 113 (1st Cir. 2004) 22

Gritzer v. CBS, Inc., 275 F.3d 291 (3d Cir. 2002) . 22

Gwaltney v. Chesapeake Bay Fdn., 484 U.S. 49 (1987) 12

Hurlic v. So. Cal. Gas, 539 F.3d 1024 (9th Cir. 2008) 19

Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989) 19

International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979) 9

Inter-Modal Rail Employees Association v. Atchison, Topeka & Santa Fe Railway Co., 520 U.S. 510 (1997) 26

Kennedy v. Plan Administrator for DuPont Sav. & Investment Plan, 129 S.Ct. 865 (2009) 8

King v. Hartford Life & Accid. Insurance Co., 414 F.3d 994 (8th Cir. 2005) 22

Lauder v. First UNUM Life Insurance Co., 384 F.3d 375 (2d Cir. 2002) 22

Mass. Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985) 20

Matuszak v. Torrington Co., 927 F.2d 320 (7th Cir. 1991) 22

Metropolitan Life Insurance Co. v. Glenn, 128 S. Ct. 2343 (2008) 10, 14

Miller-El v. Dretke, 545 U.S. 231 (2004) 21

Mitchell v. Eastman Kodak Co., 113 F.3d 433 (3d Cir. 1997) 27

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983) 21

Pitts v. America Sec. Life Insurance Co., 931 F.2d 351 (5th Cir. 1991) 22

Saffle v. Sierra Pac. Power Co. Bargaining Unit Long Term Disability Income Plan, 85 F.3d 455 (9th Cir. 1996) 27

Swede v. Rochester Carpenters Pension Fund, 467 F.3d 216 (2d Cir. 2006) 20

Thorpe v. Retirement Plan of the Pillsbury Co., 80 F.3d 439 (10th Cir. 1996) 13

United States v. Mett, 178 F.3d 1058 (9th Cir.1999) 23

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) 28

Universal Camera v. NLRB, 340 U.S. 474 (1951) . 14

University Hospitals of Cleveland v. Emerson Electric Co., 202 F.3d 839 (6th Cir. 2000) .. 22

FEDERAL STATUTES & REGULATIONS

ERISA §102, 29 U.S.C. §1022 ..... 9, 25

ERISA §204(g), 29 U.S.C. §1054(g) 7, 19, 24

ERISA §204(h), 29 U.S.C. §1054(h) 7, 19, 24

ERISA §402, 29 U.S.C. §1102 25

ERISA §404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D) 25-26

ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B) 4, 13

ERISA §502(a)(3), 29 U.S.C. §1132(a)(3) 4

29 C.F.R. 2520.102-3(l) 9, 26

29 C.F.R. 2520.104b-3(a) 9

Treas. Reg. 1.411(d)-3(a)(2) 19

Treas. Reg. 1.411(d)-6 19

60 Fed. Reg. 64320, 64322 (Dec. 15, 1995) 19

MISCELLANEOUS

G. Bogert & G. Bogert, *The Law of Trusts & Trustees* (rev. 2d ed. 1980) 15, 28

Restatement (Second) of Contracts 24-25

Restatement (Second) of Trusts 13, 24-25

W. Fratcher, *Scott on Trusts* (4th ed. 1988) 15

INTEREST OF *AMICI CURIAE*[1]

The amici, Janice C. Amara, Gisela R. Broderick, and Annette S. Glanz are named Plaintiffs in a class action captioned *Amara, et al. v. CIGNA Corp., et al.*, which is pending in the Second Circuit (08-3388 and 08-3460 (XAP)).[2] The *Amara* case covers a nationwide class of over 27,000 current and former employees of the CIGNA Corporation. Like *Frommert*, *Amara* concerns violations of ERISA's disclosure rules and the district court's authority in crafting remedies for those violations. See 534 F.Supp.2d 288 and 559 F.Supp.2d 192 (D.Conn. 2008). The amici believe that this Court's decision in *Frommert* may affect their rights to retirement benefits and because of *stare decisis* that there may be no other case in which this Court will reconsider those rights. For the amici and other current and former employees covered by this class, the consequences of reductions in retirement benefits that are not understandably and timely disclosed range from making it difficult to pay for items such as food and utilities to making it difficult to pay for medical care, the rent or a mortgage.

---

[1] Pursuant to Supreme Court Rule 37.6, the amici curiae state that no person or entity other than the amici and the undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored this brief in whole or in part. Petitioners and Respondents have consented to the filing of this amicus brief in letters on file with the Clerk of the Court.

[2] The Second Circuit summarily affirmed on October 6, 2009, 2009 WL 3199061, thereby denying both parties' appeals, but CIGNA has filed a motion to stay the mandate pending a petition for certiorari to this Court and the Plaintiffs are considering a petition.

The Pension Rights Center is a Washington, D.C. nonprofit consumer organization, which has as its mission the protection and promotion of retirement security for workers, retirees and their families. For 33 years, the Center has provided information and assistance to thousands of participants and beneficiaries and has represented their interests before the federal administrative agencies and the courts. The Pension Rights Center is frequently invited to testify before Congressional committees and has testified in support of both of the statutory provisions at issue in this case: The "anti-cutback" rule in ERISA §204(g), 29 U.S.C. §1054(g), as amended by the 1984 Retirement Equity Act ("REA"), and the advance notice of reduction requirement in ERISA §204(h), 29 U.S.C. §1054(h), as enacted in 1986 and amended in 2001. The Pension Rights Center believes it is critical to the retirement security of participants and beneficiaries covered by private pension plans that the federal courts are authorized to craft appropriate remedies where it has been shown that plan administrators failed to comply with the statutory requirements that Congress enacted to protect participants and their spouses.

Counsel for the amici have litigated many of the issues that are currently before this Court in the *Amara v. CIGNA* class action. Counsel for the amici have also prepared amicus briefs for this Court in a number of cases, including *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992);*Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Hughes*

Aircraft Co. v. Jacobson, 525 U.S. 432 (1999); and *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004), and are thus qualified to submit this brief.

BACKGROUND

The *Frommert* litigation is a multi-plaintiff action involving 104 former Xerox employees. The plaintiffs challenge an offset from their retirement benefits based on lump sum distributions made before Xerox rehired them for second terms of employment. For purposes of effecting the offset from their future pensions, Xerox took the previous distributions and inflated them by imputing interest equal to the investment returns that Xerox enjoyed during the periods between the prior distribution and their subsequent retirement. Internally, Xerox called this a "phantom offset" because the interest that Xerox was imputing was not actually earned by the employees whose pension benefits were reduced.

In a 2006 decision ("*Frommert I*"), the Second Circuit found that the plan administrator's position that this phantom offset had "always" been in Xerox's plan document was "unreasonable" under either a "de novo" or an "arbitrary and capricious" standard of review. 433 F.3d 254, 266. Xerox pointed to a "non-duplication" provision which had always been in the plan. The "nonduplication" provision provided that:

> In the event any part of or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date,...the accrued benefit of such member based on all Years of

> Participation shall be offset by the accrued benefit attributable to such distribution.

The Second Circuit found that this provision and the disclosures in the Summary Plan Descriptions ("SPDs") were insufficient to establish a phantom offset. *Id.* The Second Circuit found that, based on the SPD, the persons who were rehired before 1998 "likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received." *Id.* at 267.

The Second Circuit next turned to the issue of whether Xerox's 1998 amendment to the plan to "clarify" the phantom offset violated ERISA. The Court determined that the amendment violated ERISA § 204(g), the "anti-cutback" rule, to the extent that the amendment was retroactive, and ERISA §204(h), which requires advance notice to employees of any amendment that reduces future pension benefits. *Id.* at 266 and 268.The Second Circuit determined that "sweeping relief" under ERISA §502(a)(3) was not "warranted" in this case because the violations affected the closed group of participants who were rehired before a new SPD was distributed in 1998 which disclosed the phantom offset, and that "the necessary remedies can be fully provided under [ERISA] §502(a)(1)(B)." *Id.* at 269-70.[3] The Second Circuit

---

[3] At the same time, the Second Circuit concluded that Plaintiffs' claim for breach of fiduciary duty in the communications about the phantom account could go forward under ERISA §502(a)(3). *Id.* at 270-72.

remanded the case with directions to the District Court that:

> [T]he remedy crafted for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Id. at 268.

On remand, the District Court conducted a two-day hearing at which representatives of the Plaintiffs and Xerox both testified. The District Court also received pre- and post-hearing memoranda on relief from each side. In the memoranda and at the hearing, Xerox's plan administrator proposed an approach under which an interest rate slightly below the one Xerox previously applied would be used to craft a remedy for the ERISA violations. An actuarial expert testified about financial and actuarial justifications for Xerox's approach. See 535 F.3d 111, 119 (2008). The approach that Xerox advocated did not reflect a past practice and had never been applied in administration of the plan. Respondents' Br. at 54 (citing A940; A1121).

After considering the proposals from all parties, the District Court issued a decision in which it found that "there was no description whatsoever as to the mechanics of this so-called phantom account" in the "non-duplication" provision. 472 F.Supp.2d 452, 457-58 (W.D.N.Y. 2007). The District Court further found that the SPDs distributed before 1998 provided "even less guidance than the Plan," with the only related proviso being that "the amount you receive may also be reduced if you had previously left the company and received a distribution at that time." *Id.* at 458.

The District Court concluded that in these circumstances the offset should be the "nominal value" of the prior distributions, i.e., the prior distributions without interest, because of the absence of any plan provision or disclosure specifying a rate of interest or a mechanism for a phantom offset. In response to Xerox's proposed approach, the District Court stated that its decision was "based on the language of the Plan and the SPD," not "[w]hat is 'best' from a financial or actuarial point of view." *Id.* at 457.

The Xerox Defendants appealed and in *Frommert II*, the Second Circuit affirmed the District Court's decision "crafting a remedy for the identified ERISA violations." 535 F.3d 111, 123 (2008). The Second Circuit held that:

> The District Court had discretion to design a remedy to provide Plaintiffs-Appellees with the proper level of pension benefits in light of the ERISA violations we identified in our prior decision. As Defendants-Appellants wrote a

> pension plan that addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence, we see no problem with the District Court's selection of one reasonable approach among several reasonable alternatives.

Id. at 119.

In their appeal and petition for certiorari, the Xerox Defendants contend that the District Court was "obligated to defer" to the company-appointed plan administrator's proposal for utilization of an imputed rate of interest in determining the offset.[4]

SUMMARY OF ARGUMENT

This case concerns the judiciary's authority to craft a remedy for an abuse in discretion in interpreting the Plan and violations of two statutory requirements. The statutory requirements protect employees' retirement benefits against reductions by plan amendments and provide for advance notice of any amendment that reduces employees' future retirement benefits. ERISA §§204(g) and (h), 29 U.S.C. §§1054(g) and (h), thus provide that no amendment shall reduce accrued benefits and that an amendment that reduces future retirement benefits without the required advance

---

[4] The Second Circuit held that Xerox Defendants had "waived" any argument that the issue of relief should have been "remanded" to the plan administrator, 535 F.3d at 118, and the Defendants-Appellants did not request certiorari on that issue.

notice is ineffective.

In *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 741 (2004),this Court ruled unanimously that ERISA §204(g) "prohibits any amendment of a pension plan that would reduce a participant's 'accrued benefit.'" *Heinz* held that accrued benefits are reduced not only when the amount is directly decreased, but also when an employer imposes new "conditions" or "materially greater restrictions on the[ir] receipt." 541 U.S. at 744.

In *Frommert I*, the Second Circuit applied *Heinz* in concluding that "although Xerox's phantom account does not directly deplete an employee's pension account, by altering the comparative process, it imposes a condition on the payment of benefits that leads just as surely to a decrease." 433 F.3d at 268.

This Court has also ruled that both the Plan document and the SPD are "documents and instruments governing the plan." *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S.Ct. 865, 877 (2009). Plan administrators have a "duty to run the plan in accordance with [these] documents and instruments." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 82 (1995). "Under ERISA, both Summary Plan Descriptions and plan amendment summaries 'shall be written in a manner calculated to be understood by the average plan participants.'" *Id.* at 83-84. In terms of "contents," the Department of Labor's regulations follow ERISA §102(b) by requiring SPDs to include "a statement clearly identifying circumstances which may result in ... denial, loss,

forfeiture, suspension, *offset*, reduction or recovery (e.g., by exercise of subrogation or reimbursement rights) of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits." 29 C.F.R. 2520.102-3(l) (emph. added).[5] In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989), this Court found that ERISA's disclosure requirements "ensur[e] that the individual participant knows exactly where he stands with respect to the plan."[6]

In *Frommert I*, the Second Circuit determined that Xerox failed to adequately or understandably disclose the "phantom offset" in an SPD before the new SPD was issued in 1998 and that it failed to comply with the advance notice requirement in ERISA §204(h). 433 F.3d at 267-69. The District Court and the Second Circuit found that the only notice about the offset in

---

[5] Under ERISA §102(a) and 29 C.F.R. 2520.104b-3(a), summaries of material modifications are required to disclose "any change in the information required" to be disclosed in the SPD, including the "circumstances which may result in loss, forfeiture, ... offset [or] reduction of any benefits that a participant ... might reasonably expect the plan to provide on the basis of the description of benefits."

[6] In *Int'l Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 569-70 (1979), this Court also held that "Whatever benefits employees might derive from the effect of the Securities Acts are now provided in more definite form through ERISA" because "ERISA requires pension plans to disclose specified information to employees in a specified manner, ... in contrast to the indefinite and uncertain disclosure obligations imposed by the antifraud provisions of the Securities Acts."

the prior SPDs was a "proviso that 'the amount you receive may also be reduced if you had previously left the company and received a distribution at that time." 472 F.Supp.2d at 458; 433 F.3d at 265. That led the persons who were rehired before 1998 to "believe[]" that only "the amounts they had actually received" in the past distributions would be "factored into their benefits calculations." 433 F.3d at 267.

The amici respectfully submit that this Court should affirm the District Court's authority to craft relief for these violations without being "obligated to defer" to a remedial proposal by the losing party aimed at lessening the relief. As in this case, private pension plan administrators are not quasi-judicial officers, but are frequently employees of the plan sponsor who carry out their plan-related duties as part of their normal job functions. And as here, they are generally appointed and removable at will by the company's executives, which leaves them with little or no insulation from management influence. The conflicts of interest to which such arrangements lead are well-known and incontestable. See *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343, 2346-50 (2008), ("dual role" as administrator and payor "creates a conflict of interest"; employer's "immediate financial interests" counsel in favor of denying "a borderline claim"; conflict "may extend" to the employer's selection of an administrator).

In spite of these conflicts, or because of them, plan sponsors and their counsel often draft the governing instruments of employee benefit plans to confer broad discretion on plan administrators in interpreting the

plan's terms, to which the courts generally defer. Under ERISA, however, such discretion must always be limited by the "duty to run the plan 'in accordance with the documents and instruments ... *insofar as such documents and instruments are consistent with the provisions of [the statute]*.'" *Schoonejongen*, supra, 514 U.S. at 82 (emph. added).[7]

It is critical to the retirement security of participants and beneficiaries covered by the private retirement system that where it has been shown that private plan administrators have failed to comply with the protective provisions of the statute, the federal courts must be authorized to craft appropriate remedies. Under the rubric of an "obligation to defer," Xerox and its amici are blatantly seeking to achieve a quasi-judicial status under which Article III judges will *not* have the authority to impose a remedy for statutory violations unless it is one that a plan administrator recommends. It would be unprecedented for this Court to rule that a federal court is "obligated to defer" to a private party who violates statutory obligations and then proposes to remedy those violations by filling in omitted or statutorily-invalid terms with rules that are financially advantageous to that party's employer, and here, very similar to the ones that caused the violations in the first place.

---

[7] Accord *Central States Teamsters v. Central Transp.*, 472 U.S. 559, 568 (1985) ("trust documents cannot excuse trustees from their duties under ERISA").

As this Court has recognized, the unfortunate truth is that litigants often "seek to evade sanction by predictable 'protestations of repentance and reform.'" *Gwaltney v. Chesapeake Bay Fdn.*, 484 U.S. 49, 67 (1987). The "protestations of ... reform" are frequently couched in proposals that offer less for violations than a strict application of the law may require. In such situations, it is up to the judiciary to make the appropriate decisions on relief based on the violations that have been shown and the statutory objectives, without having to bow to the views of the losing side.

Amici also respectfully submit that there is no conflict with the decisions of other circuits on the issue of the district court's authority to reject "post hoc rationales" or remedial proposals by the losing litigant. As shown below, every circuit has concluded that there is no obligation to defer to post hoc rationales offered for the first time in litigation, much less in crafting relief for violations. A district court may, of course, consider a remedial proposal from either side, but it is not "obligated to defer" to one party's proposal.

ARGUMENT

I. The Second Circuit Properly Determined that the District Court Had Discretion to Craft a Remedy for the Identified Statutory Violations Without Deferring to a Post Hoc Proposal from the Party Who Violated the Law.

As this Court found in *Firestone Tire & Rubber v. Bruch*, supra, 489 U.S. at 109, the arbitrary and

capricious standard of review, also known as an abuse of discretion standard, was "developed" in cases under the Labor Management Relations Act of 1947 (LMRA) and then adopted by some federal courts because "ERISA does not set out the appropriate standard of review for actions under §1132(a)(1)(B) challenging benefit eligibility determinations." The complete expression of this standard is that a denial of benefits will be overturned if it is "arbitrary and capricious, not supported by substantial evidence or erroneous on a question of law." See, e.g., *Thorpe v. Retirement Plan of the Pillsbury Co.*, 80 F.3d 439, 443 (10th Cir. 1996).

In *Bruch*, supra, 489 U.S. at 108, this Court addressed the standard of review for "actions challenging denials of benefits based on plan interpretations." *Bruch* held that "a denial of benefits ... is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." In the latter case, an "abuse of discretion" standard applies, but if the administrator or fiduciary "is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Id.* (quoting the *Restatement (Second) of Trusts*, §187, Comment d).

Bruch explicitly "limited" its decision to actions "challenging denials of benefits based on plan interpretations" and stated that "[w]e express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA." 489 U.S. at 108. The Court observed that "Unlike the LMRA,

ERISA explicitly authorizes suits against fiduciaries and plan administrators to remedy statutory violations, including breaches of fiduciary duty and lack of compliance with benefit plans." *Id.* at 110. As the full expression of the arbitrary and capricious standard shows, when statutory violations are at issue, the standard of review has always been de novo. See, e.g., *Central Laborers' Pension Fund v. Heinz*, supra. Expressed another way, "an erroneous view of the law" is always an abuse of discretion. See, e.g., *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

In *Metropolitan Life Ins. Co. v. Glenn*, supra, 128 S.Ct. at 2352, this Court revisited the standard of review for benefit denials in which the fiduciary or administrator is operating under a conflict of interest. *Glenn* held that trust law requires "the reviewing judge to take account of [a] conflict [of interest] when determining whether the trustee, substantively or procedurally, has abused his discretion." This Court found that conflicts of interest are practically endemic in employee benefit plans, but that there is no single prescription for weighing the conflicts. Following *Universal Camera v. NLRB*, 340 U.S. 474 (1951), *Glenn* concluded that there "are no talismanic words that can avoid the process of judging" in weighing conflicts and that "[w]ant of certainty in judicial standards 'partly reflects the intractability of any formula to furnish definiteness of content for all of the impalpable factors involved in judicial review."

Contrary to Petitioners' argument, it is black-letter trust law that "[w]here the court finds that there has been an abuse of a discretionary power," whether it is

abuse of discretion in interpreting a plan due to a conflict of interest or an abuse of discretion by violating a statute, "the decree to be rendered is in [the court's] discretion." G. Bogert & G. Bogert, *The Law of Trusts & Trustees*, §560 at 222 (2d ed.). This Court has never ruled, and no circuit court of appeals has ruled, that instead of having the authority to render an appropriate decree, a district court is "obligated to defer" to a fiduciary's or administrator's financially self-serving proposal for remedying his or her abuses of discretion.

An administrator's discretion also does not extend to determining the effect of statutory requirements on the extent of his or her own discretionary authority and powers. The court must determine the extent of discretionary authority, including the degree to which statutory requirements limit that authority, de novo. 3 W. Fratcher, *Scott on Trusts*, §187.1 (4th ed. 1988). In *Bruch*, this Court quoted *Scott* that:

> The extent of the duties and powers of a trustee is determined by the rules of law that are applicable to the situation, and not the rules that the trustee or his attorney believes to be applicable, and by the terms of the trust as the court may interpret them, and not as they may be interpreted by the trustee himself or by his attorney.

489 U.S. at 112 (quoting §201).

In this case, following *Bruch*, the Second Circuit's 2006 decision determined that Xerox's position that the

plan had "always" contained a "phantom offset" was "unreasonable" under either a de novo or an arbitrary and capricious standard of review. 433 F.3d at 266. As the District Court stated on remand, upon issuance of that mandate, "[u]tilization of this phantom account or anything similar to it" on a retroactive basis became a violation of law. 472 F.Supp.2d at 456. Given that the phantom offset was not in the plan or disclosed in the SPD before 1998, the Second Circuit further determined that the Xerox defendants violated the law when they attempted to add the phantom offset without complying with the minimum standard against cutbacks in accrued benefits in ERISA §204(g) and the advance notice requirement in ERISA §204(h).

On remand to determine the relief for these abuses of discretion, Xerox's administrator came up with a proposal that was basically a watered-down version of the phantom offset that the Second Circuit had ruled to be unlawful. As in *Glenn*, the proposal was "financially advantageous" to Xerox compared to a remedy which would cost Xerox $20 million and provide "substantially more money in real terms" to the Frommert plaintiffs. Respondents Br. at 25 (citing JA142a-143a) and Petitioners' Br. at 61. The administrator who developed the proposal was a Xerox employee who Xerox's CEO appointed and could replace at any time by simply appointing someone else. See Petitioners' Br. at 7 (citing JA 32a). As the Petitioners concede, the administrator's proposal on the interest rate that could still be imputed under the plan's non-duplication provision was "offered in the context of litigation," Petitioners' Br. at 36, in which the administrator as a defendant had previously taken

a different position. The Second Circuit determined that Xerox's proposal was a "mere opinion" that was never applied in determining the Frommert plaintiffs' benefits. 535 F.3d at 119. Rather it was conditional on the District Court's acceptance of it, with or without deference. The Second Circuit concluded that a "mere opinion" from a litigant who had violated the statute was entitled to consideration, but no deference. 535 F.3d at 119.[8]

There are many sound reasons to affirm the District Court's authority to craft relief without being "obligated to defer" to the interest of the Xerox defendants in lessening the relief after abuses of discretion have been proven. Clearly, the remedial purposes of statutory provisions like ERISA §§204(g) and (h) are undermined if the employees whom those statutory requirements were enacted to protect do not receive full relief even when violations are proven. Similarly, the deterrent effect of the statutory protections and the statutory objective of fostering compliance are undermined if plan sponsors and administrators know they can violate the law but still

---

[8] In full, the Second Circuit stated:

> Defendants-Appellants argue that the District Court erred in failing to adopt the plan administrator's proposed approach, or at least consider it under a deferential standard of review.... However, the District Court here had no decision to review because the plan administrator never rendered any decision other than the original benefit determinations, all of which were premised on the now-impermissible 'phantom account' offset mechanism....

lessen the remedies (or even eliminate them for many individuals) because the district courts will be "obligated to defer" to their second or even third approaches (here, the Defendants actually tendered a third approach, called the "new hire" approach, which was presented as their "preferred" approach on appeal, 535 F.3d at 117-19, but has since been abandoned).

At its core, this case boils down to the difference between a remedy under which retirement benefits are reduced by an offset calculated in the manner that the District Court determined to be most consistent with the pre-1998 Plan and SPD, or an offset calculated with imputed interest rates that Xerox's administrator devised after its previous positions were ruled to be abuses of discretion. Although Petitioners attempt to conjure up larger calamities, this is not a case about a judge's or a jury's authority to award damages disproportionate to the actual harm caused by the violations, or anything similar to that. Compare *BMW of N. Am. v. Gore*, 517 U.S. 559, 582 (1996) ($2 million punitive damage award to respondent was "500 times the amount of his actual harm as determined by the jury").

The amici respectfully submit that this Court should affirm the Second Circuit's decision for the following reasons:

A. ERISA §§204(g) and (h) and This Court's Precedents Set Lower and Upper Limits on Remedies.

ERISA §§204(g) and (h), 29 U.S.C. §§1054(g) and (h), and this Court's precedents establish lower and upper boundaries on remedies for violations: As this Court held in *Heinz*, ERISA §204(g) "prohibits any amendment of a pension plan that would reduce a participant's 'accrued benefit.'" This protection is essential to "ERISA's object of protecting employees' justified expectations." 541 U.S. at 743. In enacting ERISA §204(h), Congress likewise mandated that an amendment that reduces future retirement benefits will be ineffective unless advance notice is provided. See, e.g., *Frommert I*, 433 F.3d at 268; *Hurlic v. So. Cal. Gas*, 539 F.3d 1024, 1038 (9th Cir. 2008). Like the anti-cutback rule in ERISA §204(g), the advance notice rule protects "employees' justified expectations" in continuing to earn retirement benefits until the time they are notified that the benefits that they will earn in the future in exchange for their labor are being reduced. The regulations issued under these Sections establish expansive definitions of the "amendments" subject to these employee-friendly protections. Treas. Reg. 1.411(d)-3(a)(2); Treas. Reg. 1.411(d)-6, Q&A-5 (1998); 60 Fed. Reg. 64320, 64322 (Dec. 15, 1995) (temporary 204(h) regulations).

In remedying violations of these statutory rules, a district court is constrained by the statutory text, the statutory objectives, and the regulations to provide remedies that do not effectively allow that which is

prohibited. See, e.g., *Albemarle Paper v. Moody*, 422 U.S. 405, 416-17 (1975) (district court's discretionary decision to fashion relief must "be measured against the purposes which inform" the statute); *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989) ("discretion is rarely without limits"; even if "the text of the provision does not specify any limits upon the district courts' discretion" limits may be found in "the large objectives" of the Act).

Thus, if ERISA §204(g) is violated, a district court cannot permit the relief to effectively restore the unlawful amendment, or to replace it with new requirements that have the effect of reducing accrued benefits.[9] Similarly, if ERISA §204(h) is violated, the District Court cannot allow the amendment that is "ineffective" due to the absence of understandable advance notice to resurface retroactively, either directly or indirectly.

On the upper end, relief for violations of both statutory provisions is constrained by this Court's longstanding holding in *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 , 144 (1985), that extracontractual damages are not allowed.

---

[9] In *Swede v. Rochester Carpenters Pension Fund*, 467 F.3d 216, 222 (2d Cir. 2006), the Second Circuit thus rejected the Carpenters Fund's effort to use a limited "reforming amendment" "to avoid the effect of *Heinz*" on a plan provision that violated ERISA §204(g).

B. The Circuits Uniformly Hold that District Courts Are Not "Obligated to Defer" to Positions Advanced for the First Time in Litigation.

A district court is not obligated to defer to a construction of a plan that a party advances for the first time in litigation, and particularly not a remedial approach that is propounded only after liability has been established. The Second Circuit correctly held that:

> Defendants-Appellants have identified no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA.

535 F.3d at 119 (emph. in orig.)

Although this Court has not addressed this issue under ERISA, it has often addressed "post hoc rationalizations" in the context of administrative law. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983) (declining to accept "post hoc rationalizations for agency action"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (this Court has "never applied" deference "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice"). In *Miller-El v. Dretke*, 545 U.S. 231, 245 (2004), this Court applied the same principle in the

context of jury selection, determining that "[i]t would be difficult to credit the State's new explanation [for a peremptory strike of a black juror], which reeks of afterthought."

All of the circuit courts that have addressed this issue under ERISA have concluded that a deferential standard of review is *not* applicable to a post hoc rationale. Of course, a district court has the discretion to consider a post hoc rationale, as the District Court did here, but, contrary to Petitioners' position, the circuits have not held that it is "obligated to defer." See *Glista v. UNUM Ins. Co.*, 378 F.3d 113, 131 (1st Cir. 2004); *Frommert*, supra, 535 F.3d at 119; *Lauder v. First UNUM Life Ins. Co.*, 384 F.3d 375, 380-81 (2d Cir. 2002); *Gritzer v. CBS, Inc.*, 275 F.3d 291, 295-96 (3d Cir. 2002); *Bynum v. CIGNA Healthcare of N.C.*, 287 F.3d 305, 313 (4th Cir. 2002); *Pitts v. Am. Sec. Life Ins. Co.*, 931 F.2d 351, 357 (5th Cir. 1991) (waiver by failing to raise known defense at the outset); *University Hospitals of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 848 n.7 (6th Cir. 2000) (administrator cannot "shore up" a decision after-the-fact); *Matuszak v. Torrington Co.*, 927 F.2d 320, 322-23 (7th Cir. 1991) ("no plan can provide discretion to deny benefits for reasons identified only years after the fact"); *King v. Hartford Life & Accid. Ins. Co.*, 414 F.3d 994, 999 (8th Cir. 2005) (refusing to allow employees to "be sandbagged by after-the-fact plan interpretations devised for the purpose of litigation"); *Dishman v. UNUM Life Ins. Co.*, 269 F.3d 974, 987 (9th Cir. 2001) (rejecting a "post hoc [albeit] legally plausible justification"); *Flinders v. Workforce Stabilization Plan*, 491 F.3d 1180, 1191 (10th Cir. 2007) (omitted rationale

cannot be filled in after the fact); *Deak v. Masters Mates & Pilots Pension Plan*, 821 F.2d 572, 577 (11th Cir. 1987), cert. denied, 484 U.S. 1005 (1988) (discounting after the fact explanation).[10]

Here, Petitioners concede that the proposal for the imputation of interest for which it now seeks deference was developed on a post hoc basis "outside" of the claims context and that it has never been applied to the Frommert plaintiffs. Instead, it was an offer to the District Court conditional on acceptance. The contention that district courts should be "obligated to defer" to such proposals finds no support in the cases on post hoc rationales or in *Bruch* or *Glenn*. In fact, any such deference would only serve to encourage aggressive, arbitrary positions because the only consequence of making an arbitrary decision would be the need to have a fallback position should the first one be struck down.

---

[10] In cases dealing with the "fiduciary exception" to the attorney-client privilege, the courts likewise stop the exception once the interests of the parties become adversarial–which is no later than when litigation is filed. See *United States v. Mett*, 178 F.3d 1058, 1064 (9th Cir. 1999). So it is here: Once the *Frommert* lawsuit was filed, the administrator's position vis à vis the plaintiffs and the issues in the lawsuit became adversarial. As a result, any proposal concerning the plan's terms after the litigation was filed cannot be entitled to deference, because the concept of deference is founded on the existence of a fiduciary relationship.

C. In Crafting Remedies, Judges and Juries Often Deal with Omitted Terms or Provisions that Statutory or Common Law Rules Have Invalidated.

In the process of judging, judges and juries often deal with omitted terms or provisions that are invalidated by common law or statutory rules. It is black-letter contract law that when a plaintiff has been injured by a breach of contract, he or she has the right to damages in an amount that will put him in "as good a position as he would have been had the contract been performed." *Restatement (Second) of Contracts*, §347 ct. a (1981). The same principle applies under the law of trusts: The remedy for a breach of trust is to put the beneficiary in the position he would occupy if the breach had not occurred. See, e.g., *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985).

The process of determining what will put a plaintiff in the position that he or she would occupy if the breach of trust or contract had not occurred is what requires judgment either by a judge or a jury. In these situations, the court cannot avoid its responsibility because there is more than one plausible alternative, nor can it pass its obligations along to a person who is not an officer of the court. Nor can there be any obligation for the judge or jury to defer to the party, including a trustee, who has engaged in the abuse of discretion or illegality.

By their terms, ERISA §§204(g) and (h) invalidate non-compliant plan "amendments." This will often leave at least some gap or ambiguity in the rules that

are to be applied instead. Such gaps or ambiguities are the traditional grist for judicial discretion. Under both contract and trust law, when a part of the contract or trust is determined to be unlawful, the parts that are lawful may be enforced, provided that they can be separated from the part which is bad. See *Rest. (Second) of Contracts*, §184; *Rest. (Second) of Trusts*, §65. It is up to the courts to make this determination and then to figure out how to enforce the lawful parts of the contract or trust. In these situations, the courts obviously must act carefully, independently, and judiciously without delegating their authority to persons or entities outside of the judicial process, much less delegating their authority to the losing litigant.

Petitioners contend that the courts should not engage in this process at least when the governing documents for the plan are drafted, as Xerox did, to afford the plan administrator "broad discretion ... to rectify defects, omissions, inconsistencies in the Plan." Petitioners' Br. at 2; see also *id.* at 7, 21, 33. Xerox's amici go further and maintain that a company-appointed administrator should be given discretionary authority to "'fill in the gaps' in [employee benefit] plan language (much as an administrative agency may interpret and 'fill in the gaps' in statutory language under *Chevron*...). Amici Curiae Br. of ERIC and ABC, at 8.

The position espoused by Xerox and its amici is clearly at odds with the limits on discretionary authority established by ERISA §402, 29 U.S.C. §1102, ERISA §102, 29 U.S.C. §1022, and ERISA §404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D). ERISA §402

mandates that "every employee benefit plan shall be ... maintained pursuant to a written instrument" that "shall ... specify the basis on which payments are made to and from the plan." As this Court ruled in *Schoonejongen*, supra, any amendments to those rules have to be made by following the procedures "specified" in the plan. 514 U.S. at 84; accord *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515-16 (1997). *Schoonejongen* does not leave room for retroactive, discretionary "gap-filling" by a plan administrator.[11]

Similarly, the ERISA §102 rules on SPDs and the Labor Department regulations issued thereunder specifically require that the contents of the SPD include a "statement clearly identifying circumstances which may result in ... denial, loss, forfeiture, ... *offset* [or] reduction ... of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits." 29 C.F.R. 2520.102-3(l) (emph. added). Again, circumstances that may result in a loss, offset or reduction of benefits that a participant might reasonably expect based on the affirmative description of benefits obviously cannot be added after the fact in a plan administrator's discretion. Finally, ERISA §404(a)(1)(D) codifies the limits on a plan administrator's discretion, by providing that a fiduciary is to act in accordance with the governing documents and instruments of the plan only "insofar as such

---

[11] When an amendment is not adopted under the specified procedures, it is "invalid." *Id.*

documents and instruments are consistent with the provisions of this title and title IV [ERISA Titles I and IV]."

Thus, no matter how a plan document is drafted, the extent of the administrator's discretion is limited by the provisions of the statute. Moreover, as this Court held in *Bruch*, the extent to which that discretion is limited by the statute must be determined by the courts de novo; it cannot be left to the discretion of the administrator or counsel. 489 U.S. at 112.

Without tracking the details of this analysis, the reported cases reach the same conclusion, holding that an administrator's discretion does not extend to construing the Plan to "impose a new requirement." *Saffle v. Sierra Pac. Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455, 460 (9th Cir. 1996); *Florence Nightingale Nursing Serv., Inc. v. Blue Cross/Blue Shield of Alabama*, 41 F.3d 1476, 1484 (11th Cir.), cert. denied, 514 U.S. 1128 (1995) (administrators do not have discretion to add new requirements "to those enumerated in the plan"); *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 443 (3d Cir. 1997).

Thus, in calculating additional benefits due as a result of an ERISA violation, the courts must consider and weigh both parties' positions, but ultimately decide what is required to put people in the same position that they would have occupied but for the breach or breaches. Here, as the District Court stated, its task was to determine the benefits due to rehired plan participants based on the language of the plan

and SPD insofar as they were compliant with the law, not to decide what makes sense or might be considered natural from a financial or actuarial perspective if the rules were being written on a blank slate. 472 F.Supp.2d at 457.

D. Review of the District Court's Exercise of its Discretion in Crafting a Remedy Is Under an Abuse of Discretion Standard.

Review of a district court's exercise of its judicial discretion in fashioning relief is under an abuse of discretion standard. This standard of review applies not only in ERISA cases, but under other statutes and in common law cases. See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 105 (D.C. Cir. 2001) ("As a general matter, a district court is afforded broad discretion to enter that relief it calculates will best remedy the conduct it has found to be unlawful"); G. Bogert and G. Bogert, *The Law of Trusts & Trustees*, §560 at 22 (if the court finds an abuse of discretion, "the decree to be rendered is in [the court's] discretion"). The district court has discretion regardless of who the remedy tends to favor. Parties who complain that a district judge's exercise of discretion is too cramped or too expansive clearly have a hurdle to overcome on appeal absent an inconsistency with the statute or a manifestation that the district court did not act independently, did not consider the appropriate factors in crafting relief, or erroneously believed it lacked the authority to provide relief.

II. The Second Circuit's Instructions to the District Court on How to Proceed on Remand and Its Review of the District Court's Decision Are Consistent With These Principles.

The Second Circuit properly instructed the District Court on its discretion in remedying the violations identified in the 2006 decision. The District Court followed the Second Circuit's instructions, including by holding a two-day hearing (which the Second Circuit did not require). Xerox presented its proposals to the District Court directly and through an expert witness and submitted pre- and post-trial memoranda. The District Court's decision discussed the positions on relief that the Defendants advanced and articulated the reasons why it did not accept them, emphasizing that "this Court is not charged with writing a sound retirement plan. Rather, I must interpret the Plan as written and consider what a reasonable employee would have understood to be the case concerning the effect of prior distributions." 472 F.Supp.2d at 457.

The Second Circuit also properly affirmed after reviewing the District Court's decision and Xerox's arguments on appeal. The Second Circuit found that the "Defendants-Appellants had ample opportunity to explain fully the approach proposed by the plan administrator" and that the District Court considered the testimony from both sides' experts "regarding which of various proposed remedies was the most fair and equitable." 535 F.3d at 118-19. The Second Circuit found that Xerox's proposal was a "mere opinion" that was not entitled to deference "because the plan

administrator [had] never rendered any decision other than the original benefit determination ... premised on the now-impermissible 'phantom account' offset mechanism." *Id.* at 119. In *Frommert I*, the Second Circuit had previously found that the pre-1998 Plan "did not specify how [it] would account for the prior distributions..., and, more significantly, made no mention of the phantom account offset or the fact that the hypothetical increased value of the prior distribution would be factored into the calculation of a rehired employee's benefits" and that the pre-1998 SPD "led plan participants to believe that [a phantom offset] was not a component of the Plan." 433 F.3d at 258 and 267. On review of the decision on remand, the Second Circuit concluded that the District Court acted within its "allowable discretion" in "design[ing] a remedy to provide Plaintiffs-Appellees with the proper level of benefits in light of the ERISA violations we identified in our prior decision." 535 F.3d at 119. As this Court stated in *Glenn*, "[w]e can find nothing improper in the way in which the court conducted its review." 128 S.Ct. at 2352.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Second Circuit.

Respectfully submitted,

Stephen R. Bruce
Counsel of Record
Allison C. Pienta
805 15th St., NW, Suite 210

Washington, DC 20005
(202) 289-1117

Counsel for *Amici Curiae*
In Support of Respondents

November 20, 2009

AMICUS CURIAE BRIEF

(11)

No. 08-810

Supreme Court, U.S.
FILED
SEP 21 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,
Petitioners,

v.

PAUL J. FROMMERT, ET. AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICI CURIAE* BUSINESS ROUNDTABLE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

MARIA GHAZAL
BUSINESS ROUNDTABLE
1717 Rhode Island Ave., NW
Suite 800
Washington, D.C. 20036
(202) 872-1260

JEFFREY A. LAMKEN
Counsel of Record
MICHAEL G. PATTILLO, JR.
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

ROBIN S. CONRAD
SHANE B. KAWKA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

QUENTIN RIEGEL
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Ave., NW
Suite 600
Washington, DC 20004-1790
(202) 637-3058

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

BOTH 5 IRWGN

QUESTIONS PRESENTED

1. Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other courts of appeals, that a district court has no obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits.

2. Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other courts of appeals, that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Interest Of *Amici Curiae*	1
Statement	4
I. Statutory Framework and the Cause of Action Under ERISA § 502(a)(1)(B)	4
II. Proceedings Below	6
A. The Suit, Initial Ruling, and Initial Appeal	6
B. Remand Proceedings	8
Summary of Argument	10
Argument	12
I. Under ERISA § 502(a)(1)(B), Courts Must Construe the Plan To Determine or Award Benefits Due "Under the Terms of the Plan"	15
A. ERISA's Enforcement Provisions Carefully Distinguish Between Causes of Action for Benefits Determinations "Under the Terms of the Plan" and Actions for Equitable Relief	17
B. The Second Circuit Erroneously Construed § 502(a)(1)(B) To Provide Equitable Relief Rather Than the Benefits the Plan Provides	20
II. Judicial Deference to the Plan Administrator's Interpretation Is Essential to the Administration of Large ERISA Plans	25

TABLE OF CONTENTS—Continued

Page

A. The Plan Administrator's Construction of the Plan Is Entitled to Deference Whether or Not Issued in a Formal Benefits Determination 25

B. An ERISA Plan Administrator's Authority To Interpret the Plan Is Crucial in Ensuring Uniform Plan Administration 26

C. The Decision Below Eviscerates the Uniformity of Plan Interpretation That Is Essential to Countless Plan Administrator Decisions 28

III. The Decision Below Discourages Companies from Providing Employees with Benefits Plans by Undermining the Predictability of Plan Interpretation and Application 31

Conclusion 34

TABLE OF AUTHORITIES

Page

CASES

Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan v. *Willard*, 393 F.3d 1119 (10th Cir. 2004) 30

Aetna Health v. *Davila*, 542 U.S. 200 (2004) ..... *passim*

Armstrong v. *LaSalle Bank Nat'l Ass'n*, 446 F.3d 728 (7th Cir. 2006) 29

Baxter v. *Lynn*, 886 F.2d 182 (8th Cir. 1989) 30

Burstein v. *Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365 (3d Cir. 2003) 18

Chandris, Inc. v. *Latsis*, 515 U.S. 347 (1995) 19

Conn. Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 15

Feifer v. *Prudential Ins. Co.*, 306 F.3d 1202 (2d Cir. 2002) 18, 22

Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989) ..... *passim*

First Options of Chicago, Inc. v. *Kaplan*, 514 U.S. 938 (1995) 19

Fort Halifax Packing Co. v. *Coyne*, 482 U.S. 1 (1987) 27

Hunter v. *Caliber Sys., Inc.*, 220 F.3d 702 (6th Cir. 2000) 31

Izzarelli v. *Rexene Prods. Co.*, 24 F.3d 1506 (5th Cir. 1994) 31

TABLE OF AUTHORITIES—Continued

Page

Johnson v. *Buckley*, 356 F.3d 1067 (9th Cir. 2004) 20

Katz v. *Comprehensive Plan of Group Ins.*, 197 F.3d 1084 (11th Cir. 1999) 20

Kennedy v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009) ..... *passim*

Larocca v. *Borden, Inc.*, 276 F.3d 22 (1st Cir. 2002) 20

Lockheed Corp. v. *Spink*, 517 U.S. 882 (1996) 16, 29, 32

Mass. Mut. Life Ins. Co. v. *Russell*, 473 U.S. 134 (1985) ..... *passim*

McDonald v. *Provident Indem. Life Ins. Co.*, 60 F.3d 234 (5th Cir. 1995) 31

Metro. Life Ins. Co. v. *Glenn*, 128 S. Ct. 2343 (2008) ..... *passim*

Metro. Life Ins. Co. v. *Wheaton*, 42 F.3d 1080 (7th Cir. 1994) 33

Moench v. *Robertson*, 62 F.3d 553 (3d. Cir. 1995) 29

Nachman Corp. v. *Pension Benefit Guar. Corp.*, 446 U.S. 359 (1980) 5

Patterson v. *Shumate*, 504 U.S. 753 (1992) 27

Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987) 4, 17, 31

Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. *Hendon*, 541 U.S. 1 (2004) 27

Strom v. *Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999) 18

TABLE OF AUTHORITIES—Continued

Page

Sunbeam-Oster Co., Inc. Group Benefits Plan for Salaried & Non-Salaried Bargaining Hourly Employees v. *Whitehurst*, 102 F.3d 1368 (5th Cir. 1996) 30

Tolle v. *Carroll Touch, Inc.*, 977 F.2d 1129 (7th Cir. 1992) 19, 21

Tolson v. *Avondale Indus. Inc.*, 141 F.3d 604 (5th Cir. 1998) 20

United States v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996) 29

Varity Corp. v. *Howe*, 516 U.S. 489 (1996) 19, 23, 32

Wald v. *Sw. Bell Corp. Customcare Med. Plan*, 83 F.3d 1002 (8th Cir. 1996) 20

Washington v. *Murphy Oil USA, Inc.*, 497 F.3d 453 (5th Cir. 2007) 18

STATUTES

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* ..... *passim*

29 U.S.C. § 1001a(c)(2) 4, 31

29 U.S.C. § 1001b(c)(2) 4, 31

29 U.S.C. § 1082 29

29 U.S.C. § 1102(a)(1) 5

29 U.S.C. § 1102(b) 5, 15, 21

29 U.S.C. § 1102(b)(4) 13

29 U.S.C. § 1104(a)(1)(D) 5

TABLE OF AUTHORITIES—Continued

Page

29 U.S.C. § 1132(a) 5, 17

29 U.S.C. § 1132(a)(1)(B) ..... *passim*

29 U.S.C. § 1132(a)(3) 6, 18

29 U.S.C. § 1144(a) 27

MISCELLANEOUS

Seyfarth Shaw LLP, *Annual Workplace Class Action Litigation Report* (2009) http://www.seyfarth.com/dir_docs/newsitem/d7e270e5-c943-4cf0-8ace-5126d42fbb8e_documentupload.pdf. 32

Pension Benefit Guaranty Corporation 2008 Annual Report, available at http://www.pbgc.gov/docs/2008_annual_report.pdf 33

Philip R. Lochner, Jr., *Economic Regulation and Democratic Government*, 25 J. Corp. L. 831 (2000) 33

IN THE

Supreme Court of the United States

No. 08-810

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET. AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICI CURIAE* BUSINESS ROUNDTABLE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

Business Roundtable is an association of chief executive officers of leading U.S. companies.[1] Together, those

[1] This brief is filed with the consent of the parties, and letters of consent have been filed with the Court. Pursuant to this Court's

companies have $5 trillion in annual revenues and nearly 10 million employees. They comprise nearly a third of the total value of the U.S. stock markets and pay nearly half of all federal corporate income taxes. Annually, they return $133 billion in dividends to shareholders and the economy. Business Roundtable is committed to advocating public policies that ensure vigorous economic growth, a dynamic global economy, and a well-trained and productive workforce, which is essential to future competitiveness. Business Roundtable companies give more than $7 billion a year in combined charitable contributions, representing nearly 60 percent of total corporate giving. They are technology innovation leaders, with more than $70 billion in annual research-and-development spending—more than a third of the total private such spending in the United States.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

The National Association of Manufacturers ("NAM") is the Nation's largest industrial trade association, repre-

---

Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

senting small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

This case presents important issues under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Under ERISA, an ERISA plan may give its "plan administrator" the authority to interpret the plan's terms. Where that occurs, courts generally must defer to the plan administrator's reasonable construction. See *Metro. Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343, 2348 (2008); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989). In the decision below, the court of appeals held that a district court may refuse to defer to the ERISA plan administrator's interpretation of an ambiguous ERISA plan term, and instead adopt its own reading of that term, simply because the administrator's interpretation was not issued in the course of processing a claim for benefits under the plan's claims procedures. It further held that, once a district court rejects the plan administrator's construction, the district court may then determine the benefits due plan participants based on the court's remedial "discretion" rather than the terms of the ERISA plan itself, and appellate courts must defer to the exercise of that discretion.

Amici's members sponsor and lead companies that sponsor some of the country's largest ERISA plans. Those plans often grant the plan administrator authority to interpret and resolve ambiguities within ERISA plan

documents, but are nonetheless often the subject of litigation relating to plan interpretation. The decision below undercuts the traditional deference owed to the plan administrator's construction by refusing to defer except where that construction is issued in the context of a benefits determination. The decision, moreover, erroneously gives district courts remedial "discretion" to determine plan benefits rather than requiring those benefits to be determined as a matter of law according to the terms of the plan and federal contract-construction principles.

Those holdings eviscerate the ability of plan administrators to manage plans equitably for the benefit of all plan participants. They gut ERISA's goal of nationwide uniformity, allowing federal district courts in different judicial districts to require different implementations of the same plan provisions based on different exercises of judicial remedial "discretion." And they threaten to expose myriad daily decisions by plan administrators—all made outside formal plan benefits determinations—to replacement with judicial determinations even though the plan documents grant the plan administrator global authority to interpret plan terms and nowhere limit that authority to formal benefits determinations. *Amici* have a strong interest in, and a unique perspective on, those issues.

STATEMENT

I. Statutory Framework and the Cause of Action Under ERISA § 502(a)(1)(B)

The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, regulates employee-benefits plans both for the protection of plan participants and to encourage "the maintenance and growth" of such plans. 29 U.S.C. §§ 1001a(c)(2), 1001b(c)(2); see also *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987)

(discussing "the public interest in encouraging the formation of employee benefit plans"). Where an employer chooses to provide an employee-benefits plan, ERISA requires that its terms be reduced to a "'written instrument.'" *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 875 (2009) (quoting 29 U.S.C. § 1102(a)(1)). And ERISA "generally obligates administrators to manage ERISA plans 'in accordance with the documents and instruments governing' them." *Id.* at 868 (quoting 29 U.S.C. § 1104(a)(1)(D)).

The plan documents govern issues such as the procedure for funding the plan, the allocation of responsibilities for operating and administering the plan, and the basis on which payments are made to and from the plan. 29 U.S.C. § 1102(b). ERISA plans can also grant the plan administrator authority to interpret the plan's terms. This Court has held that, where the plan documents provide that authority, the plan administrator's interpretation is entitled to deference. See *Metro. Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343, 2348 (2008); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989).

ERISA also provides a comprehensive enforcement regime, including "six carefully integrated civil enforcement provisions" in ERISA § 502(a) (29 U.S.C. § 1132(a)). *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985). Those provisions form an "interlocking, interrelated, and interdependent remedial scheme" under ERISA's "'comprehensive and reticulated'" statutory structure. *Ibid.* (quoting *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)). Most relevant here, § 502(a)(1)(B) provides each plan beneficiary with a cause of action "to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under

the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Section 502(a)(3) separately provides a cause of action for a beneficiary "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3).

II. Proceedings Below

A. The Suit, Initial Ruling, and Initial Appeal

Plaintiffs are employees of Xerox Corporation who are participants in the Xerox Corporation Retirement Income Guarantee Plan (the "plan"). Pet. App. 25a. Plaintiffs had each left the company at one point and received lump-sum distributions of their retirement benefits accrued to that date, but rejoined the company at a later date. *Ibid.* Plaintiffs sued the plan and its administrators under ERISA §§ 502(a)(1)(B) and 502(a)(3) (29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(3)), among other provisions, "seeking clarification of their rights to future benefits." Pet. App. 74a-75a. The crux of their claim was that the plan administrator erred in calculating the amount by which the payouts they had previously received would reduce their future benefits. Pet. App. 75a.

The plan administrator had utilized a "phantom account offset" methodology. That methodology not only reduces the employee's level of future benefits by the amount of the previous lump-sum payment, but also takes into account the time-value of money by offsetting for "hypothetical investment gains" that would have resulted had the earlier lump-sum payment not been made to the employee and instead remained with the plan. Pet. App. 5a. Plaintiffs argued that the administrator's calculation was improper because the plan docu-

ments in effect at the time they took their lump-sum payments did not provide for the phantom account method. Pet. App. 82a. The district court granted summary judgment in favor of the plan and its administrators. It held that "defendants' calculation of plaintiffs' benefits, through use of the phantom account offset," was consistent with the plan documents. Pet. App. 93a.

Plaintiffs appealed, and the Second Circuit reversed in part. Pet. App. 22a-60a (*"Frommert I"*). The Second Circuit held that the version of the plan applicable to plaintiffs did not provide for offset of prior payouts through the phantom account method; that method was instead explained fully to participants in a later version of the plan. Pet. App. 28a-29a. The court therefore rejected the plan administrator's use of the phantom-account method in calculating plaintiffs' benefits. Pet. App. 44a.

The Second Circuit affirmed, however, the district court's dismissal of plaintiffs' claims for equitable relief under §502(a)(3). Plaintiffs had argued that they were entitled to equitable relief under §502(a)(3) even though they "ultimately [sought] money damages through recalculation of their pension benefits." Pet. App. 53a. According to plaintiffs, "the 'vehicle' for" the relief they sought "is a judgment declaring that the phantom account is prohibited by ERISA and enjoining its application in calculating the benefits of any Plan participants." Pet. App. 53a. The Second Circuit rejected that argument. Because plaintiffs could seek "recalculation of their benefits consistent with the terms of the Plan" under §502(a)(1)(B), there was "no need * * * to also allow equitable relief under §502(a)(3)." Pet. App. 53a-54a.

The Second Circuit remanded the case to the district court to determine the benefits owed to plaintiffs without

application of the phantom account method. The court stated:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. * * * As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Pet. App. 51a.

B. Remand Proceedings

On remand, the district court held a hearing and received briefing from the parties on the appropriate calculation of benefits under the plan without reference to the phantom account method the Second Circuit had disallowed. Pet. App. 102a. The plan administrator offered an interpretation based on the plan's provision that the benefits of a rehired employee "shall be offset by the accrued benefit attributable" to the prior lump-sum distribution. Pet. App. 141a. The plan administrator's proposed method would have used acceptable actuarial methodologies to convert the rehired employee's lump-sum payment into a retirement annuity using rates from the Pension Benefit Guaranty Corporation in accordance with Section 4.3(e) of the plan (which governs annuities), and then offset the floor benefit provided by the plan by that amount. Pet. App. 144a-154a. Plaintiffs, by contrast, argued that the rehired employees' benefits should be offset only by the amount of money paid in the prior lump-sum distribution, with no provision to account for the time-value of money. C.A. App. 384, 521-522.

The district court did not address the merits of the plan administrator's position. It simply stated that "[t]o the extent that there is some ambiguity as to the precise manner by which prior distributions are to be offset from present benefits, it is Xerox, not the employees, who should suffer." Pet. App. 104a. The court concluded that plaintiffs' benefits should be calculated as plaintiffs had proposed—by deducting the nominal amount of the prior lump-sum payment, without accounting for the fact that they and not the plan had the use of that money for years. See Pet. App. 102a-108a.

The Second Circuit affirmed the district court's decision in relevant part. Pet. App. 1a-21a ("*Frommert II*"). The court stated that its task was to "review [the] district court's chosen remedy of an identified ERISA violation for an excess of allowable discretion." Pet. App. 8a. There was no dispute that the plan granted the administrator discretionary authority to construe the terms of the plan. See Pet. App. 142a. But the Second Circuit held that the district court had properly declined to defer to the administrator's construction. Pet. App. 12a-13a. The court stated that the plan administrator's interpretation, which it characterized as a "mere opinion," was not entitled to deference because it had been offered outside the context of an "original benefit determination[]." Pet. App. 13a.

The Second Circuit recognized that the district court had ordered the plan administrator to recalculate plaintiffs' benefits by deducting "only the nominal value of their prior lump-sum distributions, without a 'phantom account' adjustment reflecting hypothetical investment gains or, apparently, any other adjustment to reflect the inflation-adjusted values of the prior distributions." Pet. App. 8a-9a. The Second Circuit noted the plan's argu-

ment that the district court's ruling conferred a windfall on plaintiffs, who would fare better than other plan participants who had not left and then rejoined the company. Pet. App. 10a n.3. It nevertheless affirmed because it saw "no problem with the District Court's selection of one reasonable approach among several reasonable alternatives," Pet. App. 13a-14a, and did "not view the remedy crafted by the District Court to be 'wholly unjust,'" Pet. App. 10a n.3.

SUMMARY OF ARGUMENT

I. A. Plaintiffs in this action prevailed in their suit under ERISA §502(a)(1)(B), which creates a cause of action "to recover benefits due to [a plan beneficiary] under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. §1132(a)(1)(B). Because it seeks "benefits under the terms of the plan," 29 U.S.C. §1132(a)(1)(B), a suit under §502(a)(1)(B) is one for "contractually authorized benefits," *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985). The court's task thus is to determine what benefits the plan's terms provide for as construed in light of federal contract-construction principles.

B.-C. The Second Circuit departed from that clear statutory directive. While the court acknowledged that the appropriate benefits calculation should be based on the "ambiguous * * * pre-amendment terms of the Plan," it failed to direct the district court to apply federal contract-construction principles to the plan language. Instead, it directed the district court to "employ equitable principles" in "fashioning" an "appropriate remedy." Pet. App. 51a. It then compounded the error by reviewing the district court's ruling "for an excess of allowable discretion." Pet. App. 8a. This Court, however, has held

that *de novo* review is appropriate when there is a "dispute over the precise terms of the plan" in a § 502(a)(1)(B) suit. *Aetna Health* v. *Davila*, 542 U.S. 200, 210 (2004). The Second Circuit's decision thus departs from the long-settled principle that the ERISA plan itself—the contract between the plan sponsor and plan participants—governs the benefits that the plan provides. And in doing so, it disrupts the carefully balanced enforcement scheme that Congress provided in ERISA.

II. A. The Second Circuit also erred when it refused to defer to the ERISA plan administrator's interpretation of the plan because it was not offered in a formal "benefits determination." Pet. App. 51. Where, as here, an ERISA plan grants the administrator authority to construe the plan terms, the courts must defer to the administrator's construction. See *Metro. Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343, 2348 (2008); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989). That principle logically extends to *all* contexts in which the administrator must construe plan terms. There is no basis for the Second Circuit's decision to restrict deference to benefits determinations made under the plan's claims procedures.

B.-C. The Second Circuit's contrary rule threatens havoc in the multitude of circumstances in which plan administrators are required to construe plan terms outside of such benefits determinations. For example, plan administrators must interpret plan terms in order to properly invest plan assets, to set minimum annual funding levels, to determine whether to seek subrogation and reimbursement from plan participants, and to make myriad other decisions necessary to the operation and maintenance of the plan. The decision below destroys the certainty and uniformity that come with knowing a single

interpretation of the plan documents—the plan administrator's—will govern all such plan decisions. And worse, it potentially subjects plan administrators to the impossible task of administering a plan when different courts have construed the same plan terms to have different meanings.

III. No company is required to sponsor an ERISA employee-benefits plan. Despite Congress's efforts to encourage their growth, ERISA plans are currently going the way of the dinosaur, with many plan sponsors cutting back on benefits, and many new companies declining to create plans at all. The Second Circuit's rulings provide powerful new reasons to avoid sponsoring ERISA plans. Companies cannot be expected to sponsor plans when courts are free to award benefits based on their remedial "discretion," rather than on what the sponsor agreed to provide in the plan documents. And companies will be less willing to sponsor ERISA plans knowing that the plan administrators' interpretations will be entitled to no deference, even when those constructions are wholly reasonable, outside the narrow context of formal benefits determinations. ERISA class-action litigation has already reached epic proportions, and the decision below only encourages further litigation about the meaning of plan terms.

ARGUMENT

Although this case nominally concerns the standard of appellate review to be applied in an ERISA benefits-determination case—the Second Circuit reviewed the district court's ruling for "an excess of allowable discretion," Pet. App. 8a, when this Court has made clear that review is *de novo*, see *Aetna Health* v. *Davila*, 542 U.S. 200, 210 (2004)—it is about far more than that. This case also concerns the primacy of ERISA plan terms in benefits de-

terminations. "ERISA requires '[e]very employee benefit plan [to] be established and maintained pursuant to a written instrument' * * * ." *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 875 (2009) (quoting 29 U.S.C. §1102(b)(4)). Consistent with that, the statutory section plaintiffs prevailed under, ERISA §502(a)(1)(B), provides a cause of action to recover "benefits due * * * *under the terms of the plan*." 29 U.S.C. §1132(a)(1)(B) (emphasis added). As a result, in adjudicating cases under that provision, courts must determine what benefits *the plan* provides using federal contract-construction principles.

The Second Circuit, however, ignored that clear statutory directive. Rather than requiring the district court simply to construe the ERISA plan (according any deference due the plan administrator's interpretation), it suggested that the district court "employ equitable principles" in crafting a "remedy." Pet. App. 51a. And when the Second Circuit reviewed the district court's decision, it did not determine whether the district court correctly construed the terms of the plan (a function the court of appeals should perform *de novo*), but rather reviewed the district court's remedy "for an excess of allowable discretion." Pet. App. 8a. But a plan cannot possibly mean one thing in one court based on a district court's "discretion" and another thing in another court based on another judge's differing discretion. The plan documents can have only one meaning, and that meaning must control the amount of "benefits due * * * *under the terms of the plan*" for all participants. 29 U.S.C. §1132(a)(1)(B) (emphasis added). This Court has stressed the importance both of hewing to the terms of ERISA plan documents and of not tampering with the carefully balanced ERISA

enforcement scheme Congress has crafted. The Second Circuit's decision ignores those directives.

The Second Circuit's decision makes a second and equally fundamental error—failing to defer to the ERISA administrator's construction of plan documents. ERISA plans can grant the plan administrator authority to interpret the plan's terms. This Court has long recognized that, where the plan documents do so, the plan administrator's interpretation is entitled to deference. See *Metro. Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343, 2348 (2008); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-111 (1989). The Second Circuit's decision creates an exception to that rule, declining deference to the plan administrator's interpretation where the interpretation is not "rendered" as a "decision" in the course of processing a benefits claim under the plan's claims procedures. See Pet. App. 13a.

That holding cannot be reconciled with this Court's cases or the terms of petitioners' ERISA plan. And it threatens severe disruption to the administration of large ERISA plans. Under the Second Circuit's rule, only interpretations of the plan made during an "original benefit determination[]" are entitled to deference. Pet. App. 13a. But plan administrators have numerous duties that require them to interpret ambiguous provisions of the plan when making the myriad decisions necessary to keep the plan operating, from the selection of intermediaries to the construction of investment restrictions. Plan documents accordingly often grant the administrator broad discretionary authority to interpret the plan's terms generally—not merely in the context of processing formal benefits claims. Under the Second Circuit's decision, now the district court's construction—or its remedial "discretion"—must control all decisions notwithstanding

the plan administrator's reasonable interpretation in every context except a formal benefits determination. That cannot be correct.

Those twin rulings—providing "discretion" to the district court and refusing to defer to the plan administrator's construction—are impossible to reconcile with ERISA's goal of nationwide uniformity. They substitute the potentially different exercises of discretion by district courts for the provisions of the plan document and the plan administrator's plan-wide construction of the plan. They could make plan administration impossible, subjecting plan administrators to competing requirements from jurisdiction to jurisdiction. And they threaten to require ERISA plan administrators to pay different benefits to plan participants based on the happenstance of where the claims were filed—which is precisely what happened here.

I. Under ERISA §502(a)(1)(B), Courts Must Construe the Plan To Determine or Award Benefits Due "Under the Terms of the Plan"

This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). Here, ERISA provides for benefits to be determined according to the terms of the plan. 29 U.S.C. §1102(b). And it provides a cause of action in §502(a)(1)(B) for a determination of or payment of "benefits due * * * *under the terms of the plan*." 29 U.S.C. §1132(a)(1)(B) (emphasis added).

The Second Circuit thus erred when it held that an appellate court reviews a district court's decision to require benefits payments under ERISA §502(a)(1)(B) only "for an excess of allowable discretion." Pet. App. 8a. The

role of the courts under §502(a)(1)(B) is to determine the "benefits due * * * under the terms of the plan," 29 U.S.C. §1132(a)(1)(B)—a task that requires construction of the plan terms (with appropriate deference to the plan administrator, as discussed below). Consistent with that, this Court has clearly stated that the appropriate standard of review on appeal is *de novo*. *Davila*, 542 U.S. at 210. That makes sense. A suit under §502(a)(1)(B) is one for "contractually authorized benefits," *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985), and entitlement to relief is governed exclusively by "the terms of the plan," *Kennedy*, 129 S. Ct. 875. Longstanding principles dictate that the construction of a contract is reviewed *de novo* on appeal. See *Firestone*, 489 U.S. at 112-113.

When courts depart from statutory requirements, they often create unforeseen problems in the process. This case is no exception. The Second Circuit's failure to observe the statutory limitations on the relief available to a plan beneficiary under §502(a)(1)(B) does serious violence to ERISA and the willingness of companies to expand ERISA plans and create new ones. When a company sponsors an employee-benefits plan, it agrees to grant only such benefits as are specifically provided for in the text of the plan documents. The Second Circuit's decision, however, permits a district court to grant relief based on equitable considerations that lie beyond the text of the ERISA plan—the contract between the plan sponsor and its participants—so long as that remedy does not constitute an abuse of "allowable discretion" and is not "wholly unjust." Pet. App. 8a-10a & n.3. That is not only contrary to the statutory text, it is also grossly unfair to plan sponsors. Employers are not required to sponsor employee-benefits plans, *Lockheed Corp.* v. *Spink*, 517

U.S. 882, 887 (1996), and they cannot be expected to continue to do so if courts are given broad discretion to rewrite the terms of the deal to which the plan sponsor agreed.

A. ERISA's Enforcement Provisions Carefully Distinguish Between Causes of Action for Benefits Determinations "Under the Terms of the Plan" and Actions for Equitable Relief

"ERISA's 'comprehensive legislative scheme' includes 'an integrated system of procedures for enforcement.'" *Davila*, 542 U.S. at 208 (quoting *Russell*, 473 U.S. at 147). Those enforcement provisions, many of which are set out in ERISA § 502(a), 29 U.S.C. § 1132(a), "represent[] a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987).

Section 502(a) contains separate provisions authorizing ERISA plan beneficiaries to bring suit for, among other things, an award or determination of the benefits provided by the plan, and equitable relief for violations of ERISA itself. First, § 502(a)(1)(B) provides that a "participant or beneficiary" may bring "a civil action" "*to recover benefits due to him under the terms of the plan*, to enforce his *rights under the terms of the plan*, or to clarify his rights to future *benefits under the terms of the plan*." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). Section 502(a)(3) then provides for equitable relief for violations of the ERISA statute or the terms of a plan. That cause of action allows a "participant, beneficiary, or fiduciary" to bring suit "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce

any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3).

Plaintiffs here were permitted to proceed *only* under § 502(a)(1)(B), authorizing suits for "benefits due * * * under the terms of the plan," 29 U.S.C. § 1132(a)(1)(B). See pp. 7-8, *supra*. As this Court has explained, that provision "is relatively straightforward":

> If a participant or beneficiary believes that benefits promised to him under the terms of the plan are not provided, he can bring suit *seeking provision of those benefits*. A participant or beneficiary can also bring suit generically to 'enforce his rights' under the plan, or to clarify any of his rights to future benefits. Any dispute over the precise terms of the plan is resolved by a court under a *de novo* review standard, unless the terms of the plan "giv[e] the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."

Davila, 542 U.S. at 210 (quoting *Firestone*, 489 U.S. at 115) (emphasis added).

That conclusion is compelled by the statutory text. Section 502(a)(1)(B) provides a suit for "benefits due * * * under the terms of the plan," 29 U.S.C. § 1132(a)(1)(B), which by necessity requires construction of the plan. An action under that provision is thus essentially "the assertion of a contractual right," *Strom* v. *Goldman, Sachs & Co.*, 202 F.3d 138, 142 (2d Cir. 1999), and is governed by a uniform "federal common law of contract" derived from "general principles of contract law and * * * ERISA's purposes," *Feifer* v. *Prudential Ins. Co.*, 306 F.3d 1202, 1210 (2d Cir. 2002); see also *Washington* v. *Murphy Oil USA, Inc.*, 497 F.3d 453, 458 (5th Cir. 2007); *Burstein* v. *Ret. Account Plan for Employees of*

Allegheny Health Educ. & Research Found., 334 F.3d 365, 381 (3d Cir. 2003); *Tolle* v. *Carroll Touch, Inc.*, 977 F.2d 1129, 1133 (7th Cir. 1992) (each observing that claims for ERISA plan benefits under §502(a)(1)(B) are contractual in nature). As a creature of contract law, a claim under §502(a)(1)(B) "stands or falls by 'the terms of the plan.'" *Kennedy*, 129 S. Ct. at 875 (quoting 29 U.S.C. §1132(a)(1)(B)). Section 502(a)(1)(B) does not allow for "the recovery of extracontractual damages." *Russell*, 473 U.S. at 144.

Setting aside the deference due to plan administrators, there can be no dispute that courts of appeals must review the construction of an ERISA plan *de novo*, just as courts of appeals review questions of contract construction and statutory construction *de novo*. See *Davila*, 542 U.S. at 210 ("Any dispute over the precise terms of the [ERISA] plan is resolved by a court under a *de novo* review standard * * * ."); *Firestone*, 489 U.S. at 112-113 (review of document terms under "principles of contract law" is *de novo*); *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 369 (1995) (statutory "interpretation is a question of law"); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 948 (1995) (questions of law are reviewed *de novo*).

By contrast, this Court has indicated that §502(a)(3), which provides a cause of action for plan beneficiaries to seek *equitable relief*, is a "'catchall' provision[]" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that §502 does not elsewhere adequately remedy." *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996). Based on that, the courts of appeals have held that, "if a plaintiff can pursue [contractual] benefits under the plan pursuant to Section [502](a)(1)[(B)], there is an adequate remedy under the

plan which bars a further [equitable] remedy under Section [502](a)(3)." *Larocca* v. *Borden, Inc.*, 276 F.3d 22, 28 (1st Cir. 2002); see also *Johnson* v. *Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004); *Katz* v. *Comprehensive Plan of Group Ins.*, 197 F.3d 1084, 1088-1089 (11th Cir. 1999); *Tolson* v. *Avondale Indus. Inc.*, 141 F.3d 604, 610 (5th Cir. 1998); *Wald* v. *Sw. Bell Corp. Customcare Med. Plan*, 83 F.3d 1002, 1006 (8th Cir. 1996). Here, the Second Circuit correctly held that plaintiffs were not permitted to proceed under §502(a)(3) for that very reason. See Pet. App. 53a-54a; pp. 7-8, *supra*.

B. The Second Circuit Erroneously Construed §502(a)(1)(B) To Provide Equitable Relief Rather Than the Benefits the Plan Provides

The Second Circuit's decision cannot be reconciled with §502(a)(1)(B)'s statutory text and structure. The first time this case was reviewed by the Second Circuit (in *Frommert I*), the Second Circuit partially overlooked the fact that §502(a)(1)(B) authorizes courts to award only the benefits due "under the terms of the plan." The Second Circuit properly instructed the district court on remand to "utilize an appropriate pre-amendment calculation to determine [plaintiffs'] benefits" under the "ambiguous" terms of the pre-amendment plan. Pet. App. 51a. But it then inexplicably suggested that, in doing so, the district court should "employ equitable principles" to "fashion[]" an "appropriate remedy." Pet. App. 51a.

When the district court's remand decision came back before the Second Circuit in *Frommert II*, the Second Circuit committed the same error again. The court of appeals did not review the district court's decision to determine whether it had properly construed the plan under contract principles. Instead, the court of appeals

reviewed "the district court's chosen remedy of an identified ERISA violation for *an excess of allowable discretion*." Pet. App. 8a (emphasis added). The Second Circuit then declined to overturn the district court's decision—notwithstanding that it required an economically irrational interpretation of the ERISA plan and conferred a windfall on the plaintiffs, see Brief for the Petitioners 58-62—because it did "not view the remedy crafted by the District Court to be 'wholly unjust.'" Pet. App. 10a n.3.

1. The Second Circuit grossly misconstrued the source of the right to benefits and the nature of a §502(a)(1)(B) suit. As a result, it employed the wrong standard of review. A participant's right to benefits derives from the terms of the ERISA plan. See 29 U.S.C. §1102(b). Correspondingly, a suit under §502(a)(1)(B) is for "benefits due * * * *under the terms of the plan*." 29 U.S.C. §1132(a)(1)(B) (emphasis added). Consequently, a court's task under §502(a)(1)(B) is *not* to "cho[ose]" a "remedy" for an "ERISA violation" based on equitable principles, upholding any result that is not "wholly unjust." Pet. App. 8a, 10a n.3. It is to determine the plaintiffs' entitlement to "*benefits due * * * under the terms of the plan*," 29 U.S.C. §1132(a)(1)(B) (emphasis added), using federal contract-construction principles. Because that involves a "dispute over the precise terms of the plan," this Court's decisions require the district court's ruling to be reviewed *de novo* (apart from any deference due the administrator's construction). *Davila*, 542 U.S. at 210.

Such suits are effectively creatures of contract law, *Tolle*, 977 F.2d at 1133, and thus they must "stand[] or fall[] by 'the terms of the plan,'" *Kennedy*, 129 S. Ct. at 875 (quoting 29 U.S.C. §1132(a)(1)(B)). The courts

cannot abandon "general principles of contract law" in a § 502(a)(1)(B) suit, *Feifer*, 306 F.3d at 1210, in favor of "fashioning" a remedy based on "equitable principles," merely because, as here, construction of the plan was made "difficult[]" because of "ambiguous" language in the plan, Pet. App. 51a.[2] The Second Circuit thus doubly erred. It erroneously advised the district court in the first instance to apply equitable principles rather than federal contract-construction principles. Pet. App. 51a; p. 8, *supra*. It then erred again by reviewing the district court's decision for an abuse of discretion rather than determining *de novo* what the plan's provisions authorize. Pet. App. 8a; see p. 9, *supra*.

That double error threatens to wreak havoc. It opens the door for parties to urge district courts to exercise equitable discretion in making benefits determinations, rather than following the "straightforward rule of hewing to the directives of plan documents" as ERISA requires. *Kennedy*, 129 S. Ct. at 875. By adopting a deferential standard of review on appeal, the court of appeals' decision hamstrings appellate courts in correcting district courts that stray from plan language and federal contract-construction principles. Finally, as explained in greater detail below, that approach fatally undermines ERISA's goal of uniformity. Uniformity cannot be achieved if the same plan must pay otherwise identically situated participants different benefits based on the

---

[2] The United States' arguments in its *amicus* brief at the petition stage suffer from a similar defect. The United States argued that "the district court had discretion to select a reasonable method in the exercise of its discretion *to craft an appropriate remedy for the ERISA violations*." U.S. Pet. Stage Br. 9-10 (emphasis added). Under ERISA § 502(a)(1)(B), however the issue is not a "remedy" for an "ERISA violation." It is the determination of benefits "under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

"discretion" exercised by different district courts in different § 502(a)(1)(B) suits. The plan documents can only have one meaning—that meaning cannot vary depending on which district judge hears a particular claim for benefits.

2. The Second Circuit's error is puzzling because that court itself distinguished between a § 502(a)(1)(B) suit for "benefits due * * * under the terms of the plan" and a suit for equitable relief under § 502(a)(3). In *Frommert I*, the Second Circuit affirmed the district court's dismissal of plaintiffs' claims for equitable relief under § 502(a)(3). Pet. App. 53a-54a. The plaintiffs had argued that they were entitled to equitable relief:

> [A]lthough [plaintiffs] ultimately seek money damages through recalculation of their pension benefits, the "vehicle" for such relief is a judgment declaring that the phantom account is prohibited by ERISA and enjoining its application in calculating the benefits of any Plan participants.

Pet. App. 53a. The Second Circuit correctly rejected that argument. It noted that, under this Court's decision in *Varity*, equitable relief is available under § 502(a)(3) *only* where other provisions of § 502 do not provide an adequate remedy. Pet. App. 54a. The court held that, because plaintiffs could seek recalculation of their benefits consistent with the terms of the plan under § 502(a)(1)(B), "there is no need * * * to also allow equitable relief under § 502(a)(3)." Pet. App. 53a-54a.

The court of appeals thus held that plaintiffs could proceed only under § 502(a)(1)(B), which provides solely for contractual "benefits due * * * under the terms of the plan," 29 U.S.C. § 1132(a)(1)(B), and that plaintiffs could not also seek equitable relief under § 502(a)(3). But it then turned around and simultaneously ordered the

district court to "craft" an "equitable" remedy on remand:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. * * * As guidance for the district court, *we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.*

Pet. App. 51a (emphasis added). When the case returned on appeal in *Frommert II*, the Second Circuit stated that its task was to "review [the] district court's chosen remedy of an identified ERISA violation for *an excess of allowable discretion*." Pet. App. 8a (emphasis added). The Second Circuit thus created a new hybrid right—equitable entitlement to benefits under the plan—that neither the statute nor the plan provides for.

This Court has expressed its "reluctan[ce] to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Russell*, 473 U.S. at 147. Here, the Second Circuit did not merely "tamper" with the various ERISA enforcement provisions that Congress delineated in §502(a)—it turned them upside down. This Court should reverse the decision below and confirm that the only remedies available under §502(a)(1)(B) are those stated in the text of the statute: recovery of benefits "due to [the beneficiary] *under the terms of the plan*"; enforcement of the beneficiary's "rights *under the terms of the plan*"; and clarification of the beneficiary's "rights to future benefits *under the terms of the plan*." 29 U.S.C. §1132(a)(1)(B) (emphasis added). Equitable principles have no place in that determination. And the appropriate appellate standard of review of the district

court's interpretation of the terms of the plan—setting aside for the moment the deference due to the plan administrator's interpretation—is *de novo*. *Davila*, 542 U.S. at 210.

II. Judicial Deference to the Plan Administrator's Interpretation Is Essential to the Administration of Large ERISA Plans

A. The Plan Administrator's Construction of the Plan Is Entitled to Deference Whether or Not Issued in a Formal Benefits Determination

An ERISA plan administrator's interpretation of the provisions of the plan generally will be subject to *de novo* review in court, "unless the plan provides to the contrary." *Glenn*, 128 S. Ct. at 2348. Thus, where "the benefit plan expressly gives the plan administrator or fiduciary discretionary authority to determine eligibility for benefits," *Firestone*, 489 U.S. at 115, "a deferential standard of review [is] appropriate," *id.* at 111. In that circumstance, the plan administrator's "interpretation will not be disturbed if reasonable." *Ibid.* There is no dispute that, in this case, the plan vested the administrator with authority to "[c]onstrue the Plan." Pet. App. 142a.

The Second Circuit held, however, that the district court was not required to defer to the plan administrator's interpretation—which the court dismissed as a "mere opinion"—because that interpretation was not offered in the context of "render[ing] * * * the original benefit determinations." Pet. App. 13a. That decision to arbitrarily restrict judicial deference to situations in which the interpretation is offered during an original benefits determination has no basis in law or logic. This Court's cases make clear that, if the plan provides the administrator with authority to interpret plan terms generally, that interpretation is entitled to deference

whenever plan interpretation is called for. See *Glenn*, 128 S. Ct. at 2348; *Firestone*, 489 U.S. at 111. Nothing in this Court's cases suggests that deference is limited to formal benefits determinations.

Any such rule would also be inconsistent with the terms of the plan. The plan here provides that the administrator has authority to "[c]onstrue the Plan." Pet. App. 142a. It does not limit the administrator's authority to construe the plan to particular provisions (*e.g.*, those involving benefits), or to particular contexts (*e.g.*, formal benefits determinations). Rather, that authority by its terms extends to all contexts where, in administering the plan, construction of the plan by the administrator is called for. The Second Circuit's decision in this action for benefits due "under the terms of the plan," 29 U.S.C. § 1132(a)(1)(B), thus disregarded the plan's unambiguous terms yet again when it refused to defer to the plan administrator's construction except in the limited context of a formal, original benefits determination.

B. An ERISA Plan Administrator's Authority To Interpret the Plan Is Crucial in Ensuring Uniform Plan Administration

The Second Circuit's decision has profoundly negative consequences. "[C]ertainty and predictability are important criteria under ERISA," *Glenn*, 128 S. Ct. at 2354 (Roberts, C.J., concurring), and they are essential to the functioning of large ERISA plans, such as those sponsored by *amici*'s members and the companies they lead. Deference to the plan administrator's interpretation ensures that a single, uniform interpretation of the plan will govern not only the payment of benefits, but also the myriad other actions that plan administrators must take pursuant to plan terms. Once the element of deference to the administrator's interpretation of the plan is removed,

the likelihood that even reasonable actions by plan administrators will be challenged in court increases dramatically. And the possibility that a single plan will be subject to different and potentially irreconcilable interpretations by different judges becomes all too real.

As "this Court has emphasized," "ERISA's goal is * * * 'uniform national treatment of pension benefits.'" *Raymond B. Yates, M.D., P.C. Profit Sharing Plan* v. *Hendon*, 541 U.S. 1, 17 (2004) (quoting *Patterson* v. *Shumate*, 504 U.S. 753, 765 (1992)). The need for ERISA plans to be governed by uniform, national standards is not a convenience but a necessity. Many of *amici's* members, and the companies they lead, sponsor ERISA plans that must serve tens of thousands of participants spread across numerous States. ERISA plans could not operate efficiently, and large businesses could not responsibly sponsor them, if they had to comply with different rules and potentially provide different benefits to participants merely because they reside in different judicial districts.

Discussion of "uniformity" under ERISA frequently focuses on ERISA's preemption provision, 29 U.S.C. § 1144(a), which prohibits state regulation of employee-benefits plans so as to ensure that "an employer's administrative scheme" will not be subject to a patchwork of state laws imposing "conflicting requirements." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 10 (1987). From a practical perspective, however, the requirement that federal courts defer to the plan administrator's interpretation of the plan is equally critical to ensuring nationwide uniformity. When companies vest their plan administrator with interpretive authority, they are entitled to expect that, consistent with *Firestone* and *Glenn*, the administrator's reasonable "interpretation will not be disturbed"—regardless of which of our 678

federal district court judges the case happens to draw. *Firestone*, 489 U.S. at 111; see also *Glenn*, 128 S. Ct. at 2348. Allowing each district court to disregard the administrator's interpretation of the plan's terms and conduct its own *de novo* review of the language (or worse, exercise its discretion to create a remedy based on equitable principles rather than plan language, see pp. 20-25, *supra*) creates an unacceptable—and entirely unnecessary—risk that plan administrators will be faced with irreconcilable interpretations of the plan.

C. The Decision Below Eviscerates the Uniformity of Plan Interpretation That Is Essential to Countless Plan Administrator Decisions

The decision below declined to defer to the ERISA plan administrator's interpretation of the plan because that interpretation was not offered within the context of the "original benefit determination[]." Pet. App. 13a. Plan administrators, however, are called upon to interpret the terms of the plan in countless ways outside the context of benefits determinations, and they are frequently required to defend those interpretations in court. The need for uniform interpretation of an ERISA plan is no less crucial—and the logic behind deferring to the plan administrator's interpretation of the plan is no less forceful—simply because the interpretive issue arises outside the context of a benefits determination.

For example, plan administrators must interpret ERISA plan provisions with respect to the investment of plan assets. Such provisions often are set forth in an investment policy statement, which addresses the plan administrator's responsibilities for selecting investments, as well as engaging third-party service providers to assist the administrator in its responsibilities of administering the plan. Uniform interpretation of the plan's investment

policy is, for obvious reasons, absolutely critical. An employee stock bonus plan under ERISA simply cannot function if a district court in Texas finds that the plan requires 100% of the plan investments to be in the employer's stock, while another district court in Florida finds that, under the same language of the same plan, the plan administrator breaches her fiduciary duties if she fails to diversify the plan's investments. Challenges to a plan administrator's investment decisions obviously do not arise within the context of original benefits determinations. See *Moench* v. *Robertson*, 62 F.3d 553, 566 (3d. Cir. 1995); *Armstrong* v. *LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006). As a result, the decision below would allow district courts adjudicating those suits to review the implementation of the plan's investment policy without any deference to the plan administrator's interpretation. That does not merely create a grave risk of liability that makes ERISA plans unattractive. It also makes it inevitable that different adjudicators will at some point exercise their *de novo* review authority (or their discretion) to impose irreconcilable investment duties on the plan.

Plan administrators also must set "minimum annual funding levels" for certain types of covered plans under ERISA §302, 29 U.S.C. §1082. *Lockheed*, 517 U.S. at 887. Those minimum funding levels are "based on the value of the benefits earned by" plan beneficiaries. *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 216 (1996). Obviously, a plan administrator's determination of "the value of the benefits earned" by the plan's beneficiaries for funding purposes will necessarily turn upon its understanding of what benefits are owed under the terms of the plan. Yet, under the Second Circuit's ruling, courts adjudicating chal-

lenges to the plan's level of funding—necessarily asserted outside the context of an "original benefit determination[]," Pet. App. 13a—would not need to defer to the administrator's interpretation of the benefits owed under the plan. ERISA plans cannot operate when major administrative decisions such as determining plan funding levels are subject to *de novo* judicial challenges that can overturn the plan administrator's reasonable interpretation of the plan language.

Plan administrators likewise are often required to construe plan provisions when deciding whether to seek subrogation and reimbursement from plan participants. In that context too, the decision below guts the traditional deference accorded to the administrator's construction. Subrogation and reimbursement decisions are never made as part of a benefits determination. To the contrary, a plan's claims for subrogation and reimbursement can be asserted only in an action that post-dates the original benefits determination. See, *e.g.*, *Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1123 (10th Cir. 2004); *Sunbeam-Oster Co., Inc. Group Benefits Plan for Salaried & Non-Salaried Bargaining Hourly Employees* v. *Whitehurst*, 102 F.3d 1368, 1373 (5th Cir. 1996); *Baxter* v. *Lynn*, 886 F.2d 182, 187 (8th Cir. 1989) (subrogation and reimbursement claims brought by plan in separate civil action). Once again, refusing deference merely because the decision is not made in a formal benefits determination proceeding is at war with the plan documents and the goal of uniformity. The plan gives the administrator general authority to construe plan terms—not just those related to the payment of benefits. And uniformity suffers where a judge in one district can agree with the plan administrator's construction that she can seek reimbursement for funds

paid to an insured plan participant, while another judge exercises his own judgment to conclude that the administrator has no right under the same plan language to reimbursement from a similarly situated plan participant.

In myriad other contexts, administrators are called upon time and again to interpret the terms of the plan outside of a benefits determination, such as in selecting an insurance underwriter for the plan, see *McDonald* v. *Provident Indem. Life Ins. Co.*, 60 F.3d 234, 235 (5th Cir. 1995); determining when valuations and contributions of employer stock must be made, see *Izzarelli* v. *Rexene Prods. Co.*, 24 F.3d 1506, 1521-1522 (5th Cir. 1994); and determining when and how it is appropriate to suspend benefits, see *Hunter* v. *Caliber Sys., Inc.*, 220 F.3d 702, 712 (6th Cir. 2000). Those and countless other decisions may be the subject of litigation outside of a benefits determination. Yet, under the decision below, a district court would owe no deference to the plan administrator's interpretation in any of those situations. ERISA plans simply cannot function when there is no assurance of uniformity in the interpretation of—and no uniform respect for the administrator's interpretation of—the plan's provisions.

III. The Decision Below Discourages Companies from Providing Employees with Benefits Plans by Undermining the Predictability of Plan Interpretation and Application

One of the primary objectives of ERISA is to encourage "the maintenance and growth" of employee-benefits plans. 29 U.S.C. §§1001a(c)(2), 1001b(c)(2); see also *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987) (discussing "the public interest in encouraging the formation of employee benefit plans"). "Nothing in ERISA," however, "*requires* employers to establish employee ben-

efit plans." *Lockheed*, 517 U.S. at 887 (emphasis added). Because an employer's decision to offer an employee-benefits plan is purely voluntary, Congress has expressed its "desire" that the body of ERISA law should not "create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Varity*, 516 U.S. at 497. The Second Circuit's twin holdings do precisely that. They remove the certainty and predictability that come with knowing that only the terms of the plan and federal contract principles—rather than a district court's exercise of equitable discretion—will govern ERISA benefits determinations. And they destroy any assurance that the plan administrator's interpretation of the plan will be accorded deference in the myriad circumstances in which it is at issue. The result therefore greatly increases litigation expenses, administrative cost, and exposure to unanticipated benefits obligations. The needless introduction of such uncertainty and concomitant expense into the administration of ERISA plans undoubtedly serves "to deter employers from setting up benefit plans." *Glenn*, 128 S. Ct. at 2349.

ERISA litigation has already reached epic levels and currently imposes massive costs on large ERISA plan sponsors. As one recent study observed, ERISA class actions lead all other forms of workplace litigation: The top ten ERISA class-action settlements in 2007 totaled $1.8 billion—a huge number—but in 2008, the top ten ERISA class-action settlements increased to a staggering total of *$17.7 billion*. Seyfarth Shaw LLP, Annual Workplace Class Action Litigation Report 3 (2009), http://www.seyfarth.com/dir_docs/news_item/d7e270e5-c943-4cf0-8ace-5126d42fbb8e_documentupload.pdf. The Second Circuit's decision would only make the situation

worse, "'fomenting'" additional ERISA suits by "draw-[ing] [plan administrators] into litigation * * * over the meaning and enforceability" of plan terms. *Kennedy*, 129 S. Ct. at 876 (quoting *Metro. Life Ins. Co.* v. *Wheaton*, 42 F.3d 1080, 1084 (7th Cir. 1994)). The prospect of judicial deference to the plan administrator's interpretation undoubtedly deters countless potential ERISA suits that could be conjured up based on alleged ambiguities in the plan terms. The Second Circuit's decision, however, would give prospective plaintiffs an incentive to challenge even reasonable actions by the plan administrator so long as they arise outside of a formal benefits determination. Indeed, under the remedial discretion standard adopted below, plaintiffs could potentially prevail merely by convincing a district court that their position was "one reasonable approach among several reasonable alternatives." Pet. App. 13a-14a.

It has been clear for some time that employee-benefits plans, and in particular defined-benefit pension plans, are "disappearing," with "[m]any older companies that offered them * * * scal[ing] them back or * * * abandoning them," and "[m]ost newer companies never institut-[ing] them in the first place." Philip R. Lochner, Jr., *Economic Regulation and Democratic Government*, 25 J. Corp. L. 831, 834 (2000). Indeed, the number of ERISA plans insured by the Pension Benefit Guaranty Corporation has dropped by over 70% in the last 20 years. See Pension Benefit Guaranty Corporation 2008 Annual Report, at 8, available at http://www.pbgc.gov/docs/2008_annual_report.pdf. Many of the burdens ERISA imposes on plan administrators and sponsors may not be avoidable. But the Second Circuit's rulings—that district courts can award benefits under ERISA § 502(a)(1)(B) based on considerations other than the

terms of the plan, and that district courts need not defer to an ERISA plan administrator's reasonable interpretation of the plan outside the context of a benefits determination—inject expense and uncertainty not merely unnecessarily, but improperly as well.

As the Chief Justice has explained, "[e]nsuring that reviewing courts respect the discretionary authority conferred on ERISA fiduciaries encourages employers to provide medical and retirement benefits to their employees through ERISA-governed plans—something they are not required to do." *Glenn*, 128 S. Ct. at 2353 (Roberts, C.J., concurring). There is no reason why a plan administrator should be stripped of that discretionary authority outside the context of benefits determinations, and the Second Circuit's ruling doing so is antithetical to ERISA's goal of encouraging employers to provide benefits plans for their employees.

CONCLUSION

For the foregoing reasons and those set forth in petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

MARIA GHAZAL
BUSINESS ROUNDTABLE
1717 Rhode Island Ave., NW
Suite 800
Washington, D.C. 20036
(202) 872-1260

ROBIN S. CONRAD
SHANE B. KAWKA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

JEFFREY A. LAMKEN
Counsel of Record
MICHAEL G. PATTILLO, JR.
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

QUENTIN RIEGEL
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Avenue, NW
Suite 600
Washington, DC 20004-1790
(202) 637-3058

Counsel for Amici Curiae

SEPTEMBER 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
NOV 20 2009
OFFICE OF THE CLERK

No. 08-810

In The
Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,
Petitioners,

v.

PAUL J. FROMMERT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* RICHARD C. CAPONE IN SUPPORT OF RESPONDENTS

RISHI BHANDARI
Counsel of Record
EVAN MANDEL
RUDOLPH DELSON
MANDEL BHANDARI LLP
11 Broadway, Suite 615
New York, NY 10004
(212) 269.5600
rb@mandelbhandari.com

Counsel for Amicus Curiae

November 20, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

INTRODUCTION 1

BACKGROUND 4

SUMMARY OF ARGUMENT 5

ARGUMENT 6

1. The Court should affirm the Second Circuit's rubric, which rewards employers who draft clear and transparent retirement plans ... 6

2. The Court should reject the alternative to the Second Circuit rubric, *i.e.* serial deference to plan administrators, because it rewards employers who draft plans poorly . 8

3. The Court should reject the alternative to the Second Circuit rubric, because a rubric of serial deference will result in a regulatory backlash, heightening the burden of ERISA compliance on business 10

CONCLUSION 11

TABLE OF CITED AUTHORITIES

Page

Cases

Cent. States Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559 (1985) 6, 7

Evans v. Eaton Corp. Long Term Disability Plan, 514 F.3d 315 (4th Cir. 2008) 5, 7

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 2

Metropolitan Life Ins. Co. v. Glenn, 128 S. Ct. 2343 (2008) 2

Standard Ins. Co. v. Morrison, No. 08-35246, 2009 U.S. App. LEXIS 23598 (9th Cir. Oct. 27, 2009) 10

Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048 (7th Cir. 1987) 6

Statutes & Regulatory Materials

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* ..... *Passim*

Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 73 Fed. Reg. 43013 (proposed July 23, 2008) 11

INTEREST OF THE AMICUS CURIAE

Richard C. Capone is the former Chief Executive Officer of UBS AG in the Americas.[1] He is also a former member of UBS AG's Managing Board, and a former Chief Executive Officer of Warburg Dillon Read LLC, the investment banking subsidiary of UBS AG in the Americas.

When he was CEO of UBS AG in the Americas, Mr. Capone had ultimate responsibility for operations that employed thousands of individuals in the United States, many of whom received benefits governed by ERISA.

Mr. Capone submits this Amicus Curiae brief to explain the value to American business of the decision reached by the Second Circuit in this case, and to dispel any impression that the arguments made by Petitioners' Amici represent the uniform opinion of America's chief executive officers.

INTRODUCTION

What makes this ERISA case important is a practical concern: how best to encourage openness and fairness in the marketplace where employers compete for employees.

---

[1] The parties have consented to the filing of this *amicus curiae* brief, and the letters of consent have been filed with the Court. Pursuant to Supreme Court Rule 37.6, Amicus affirms that no counsel for any party authored this brief in whole or in part, and that no person or entity other than Amicus and his counsel has made a monetary contribution to the preparation or submission of this brief.

In deciding this case, the Second Circuit applied a rubric that encourages employers to be clear and consistent in writing and explaining their retirement benefits plans (by rewarding plan administrators with deference), and that discourages employers from being unclear or inconsistent (by declining to defer to plan administrators serially). Employers compete for employees in a free marketplace, and the Second Circuit's rubric rewards those, and only those, who compete in clear and fair terms.

Although this case involves the Xerox Corporation, similar events could play out almost anywhere. A company offers a package of retirement benefits to its employees; over the years that company makes changes to that plan and to its descriptions of that plan; some of the company's employees, as they approach retirement, learn that their retirement benefits will be lower than they had hoped or believed. If those employees bring lawsuits, a court will quickly find itself in the same position as the district court did in this case, construing the meaning of the company's benefits plan.

In the first instance a court defers to the determinations of the plan administrator, assuming the company's benefits plan provides the plan administrator with discretion. *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2347-48 (2008); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-15 (1989). Such deference makes sense: the plan administrator is not only the person whom the employer most depended upon to manage its benefits packages, but also the person whom the employees most depended upon to explain their benefits to them.

For employers who have clearly written and consistently explained their retirement benefit plans, deference to the plan administrator ensures that ERISA claims can be resolved swiftly and efficiently; deference also ensures, to the company with a well-written and well-explained plan, that the destiny of the fund will be determined by experts on and fiduciaries of that plan, and not by the courts. *See, e.g., Evans v. Eaton Corp. Long Term Disability Plan,* 514 F.3d 315, 320-23 (4th Cir. 2008) (discussing the principles underlying deference to ERISA plan administrators, including "the desire of those who establish ERISA plans to preserve at least some role in their administration.")

But deference must have its limits. For example, courts should not defer to a plan administrator who, trying to avoid the unintended consequences of a poorly drafted plan, makes determinations that violate the terms of that plan. And if the court finds that the determination of a plan administrator actually violates ERISA (for example if enforcing the plan administrator's determination would amount to a retroactive cut-back of benefits owed), then the court need not defer to the plan administrator's approach when remedying the illegality.

This is the rubric that the Second Circuit has applied here. It is a rubric that fosters openness and fairness in the marketplace where employers compete for employees, and it would benefit American business if the Second Circuit's judgment were upheld.

BACKGROUND

It is worthwhile to summarize, in the broadest terms, what happened after Xerox's employees brought this particular case to court.

The district court initially deferred to the Xerox plan administrator's determinations under the Xerox retirement plan, approving the plan administrator's consistent use of the so-called "phantom accounts" methodology. Petioners' Appendix ("Pet. App.") at 85a-86a.

The employees appealed that decision, and the Second Circuit found that Xerox "attempted to implement the phantom account offset without properly amending the terms of the Plan or providing adequate notice to rehired employees." Pet. App. at 37a. This meant that "former employees contemplating returning to Xerox were denied the opportunity to make a meaningful decision regarding whether they would accept the terms of Xerox's pension plan." *Id.* Basically, when Xerox entered the marketplace for employees, it did not compete for those employees in clear, fair terms.[2]

---

[2] Xerox, through its Amici, argues that disallowing the phantom offset constitutes a windfall for re-hired employees. This is not the case. There would be nothing unusual about Xerox offering veteran employees an incentive to return to the company. Veteran employees are valuable to a corporation because of their pre-existing familiarity with a corporation and its culture. And, if the aim is to sweeten the deal for any veteran employees who return, there is no difference between offering re-hired veterans a retirement plan that affords a smaller offset value to prior distributions, or offering them compensation packages that are attractive in different ways.

The Second Circuit asked the district court to fashion a remedy, Pet. App. at 51a, and the district court just did that, Pet. App. at 102a-108a, but there was a second appeal, this time filed by Xerox and its plan administrators. They argued that the district court should have deferred to the Xerox plan administrators a second time; in essence they argued that the district court should not only have asked the plan administrator to formulate a second interpretation of the Xerox retirement plan in light of the Second Circuit's rejection of the "phantom accounts," but then should have deferred to that new interpretation. Pet. App. at 12a-14a.

The Second Circuit disagreed, rejecting "the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA." *Id.*

The Second Circuit applied the right rule.

SUMMARY OF ARGUMENT

1. The Court should affirm the decision below, because the rubric applied by the Second Circuit rewards employers who go to the trouble and expense of drafting clear, transparent and unambiguous retirement plans.

2. Under the alternative rubric, in which courts serially defer to plan administrators who have miscommunicated the contents of their plans,

employers who draft unclear, opaque or ambiguous plans will be rewarded.

3. Furthermore, a rubric of serial deference will lead to a regulatory backlash—further legislation, further regulation and thus further administrative burdens on American business.

ARGUMENT

1. The Court should affirm the Second Circuit's rubric, which rewards employers who draft clear and transparent retirement plans.

When considering the procedures governing ERISA disputes, the Court should consider how to reward companies who take seriously the responsibility of being frank and open with their employees about their retirement benefits. *See Cent. States Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 569-70 (1985) (noting the Court's history of considering the policy concerns underlying ERISA, including the concern of how best to ensure workers receive the benefits they have been contractually promised). The retirement benefits plan that a company offers to its employees is, at the same time, one of that company's most important tools for recruiting outstanding talent, *see Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1051 (7th Cir. 1987) (Posner, J.) ("[T]he less an employee's pension rights are worth, the higher are the wages that he will demand"), and one of that company's largest ongoing financial obligations.

One of the best rewards for companies that invest the necessary time and money to research and design a clear plan is predictability, not least because an employer must be able to know what its plan will cost to maintain. *See Glenn,* 128 S. Ct. at 2354 (Roberts, C.J., concurring in part and concurring in the judgment) ("[C]ertainty and predictability are important criteria under ERISA"). And one of the best ways for courts to provide predictability to employers is by deferring, in the first instance, to the determinations of a company's plan administrator.

The reason is simple. A company's executives rely on the plan administrator's expertise about the plan in making their own decisions, so when a court defers to a plan administrator, it is in effect enforcing the expectations of that company's management. *See, e.g., Evans,* 514 F.3d at 323. Employers that have drafted clear and transparent plans—and that have communicated the contents of those plainly and completely to their employees—should be rewarded with deference.

By contrast, employers who draft their retirement plans poorly should not benefit from the same deference; for example, if a plan is so inconsistently presented or so incoherently constructed that to enforce the plan administrator's determinations under that plan would be to retroactively amend the plan and to retroactively reduce benefits, *see, e.g.,* Pet. App. at 37a-51a, then deference is inappropriate. After all, just as an employer must be able to know what its plan will cost to maintain, its employees must be able to know that the plan will ultimately provide. *See Cent. States,* 472 U.S. at 569-70. This is not to say that

courts should intercede every time an employee's understanding of a retirement benefits plan diverges from a plan administrator's. But where a plan is so badly written or so badly presented that to enforce the plan administrator's understanding would violate ERISA, courts must be able to fashion a monetary remedy.

The reason, again, is simple: It is the court, and not the plan administrator, who is best positioned to determine what monetary remedy suits the contractual transgression. That is what courts do.

The Second Circuit's rubric encourages diligent and frank employers and discourages lazy or dishonest ones. It is a rubric that encourages fair competition and open exchanges in the marketplace where employers compete for employees—and therefore a rubric that is good for American business. The judgment of the Second Circuit should therefore be upheld.

2. The Court should reject the alternative to the Second Circuit rubric, *i.e.* serial deference to plan administrators, because it rewards employers who draft plans poorly.

To reverse the Second Circuit, by contrast, would be to create a perverse incentive. Honest employers will strive to give their employees a square deal no matter what the law permits, and will carry the necessarily higher costs of drafting good retirement plans. But less honest or less diligent employers, knowing that at every stage of an ERISA lawsuit the courts will defer to the opinions of their plan

administrators, will have an incentive to promulgate unclear benefits plans. Why undertake the expense of drafting a clear and consistent plan, why spend the time to draft ancillary materials that cannot be misconstrued, if a cheaply, quickly and sloppily written plan will get a better result?

And this is exactly what serial deference will permit: employers who write unclear or misleading plans will know that, even if an employee sues and even if a court finds that the plan violates ERISA, it will be the plan administrator who will fashion the remedy for that violation. If a court finds that the plan administrator's remedy is improper, it will be the plan administrator who will fashion the alternative remedy. Under the rule of serial deference, no matter what terms a benefits plan contains, no matter what promises that plan makes, the employer and the employer alone, through its agent the plan administrator, will control the contract.

The potential for abuse, under a rubric of serial deference, is extensive. Dishonest companies can lure promising employees away from honest employers with promises of excellent retirement benefits that they never intend to fulfill. Dishonest companies can deny benefits to aging former workers—essentially depriving their workers of the peace of mind in retirement that a benefits plan is meant to ensure—simply by insisting that their plan administrators always interpret benefits provisions narrowly. The results for the American labor market would be disastrous.

3. The Court should reject the alternative to the Second Circuit rubric, because a rubric of serial deference will result in a regulatory backlash, heightening the burden of ERISA compliance on business.

It is already costly for companies to comply with ERISA. American businesses have no interest in seeing the cost of compliance rise further. And requiring courts to serially defer to plan administrators will only lead to legislation that will raise the costs of ERISA compliance.

After all, the consequences of a rubric of serial deference are predictable: employers will make generous-sounding promises that they may not intend to fulfill; employees will have perfectly justifiable expectations about their income in retirement that will be disappointed with impunity; and employees who contest the determinations of their plan administrators will encounter serial procrastination.

Legislators and regulators, displeased with these consequences, will step in and impose greater disclosure rules on employers who offer plans governed by ERISA. This is all but inevitable: the desire to curb discretion is already driving a rise in state regulation aimed at so-called "discretionary clauses," *i.e.* clauses that give insurance administrators discretion to construe the terms of their own in insurance contracts, *see Standard Ins. Co. v. Morrison*, No. 08-35246, 2009 U.S. App. LEXIS 23598, at *3 (9th Cir. Oct. 27, 2009) (O'Scannlain, J.) (noting the trend); and the desire to mandate greater clarity in retirement benefits plans is already driving an increase in ERISA

regulation, *see, e.g., Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans,* 73 Fed. Reg. 43013 (proposed July 23, 2008).

Disclosure of retirement benefits is laudable. Honest companies already go to great lengths to achieve it. The rubric that the Second Circuit followed in this case properly aligns incentives and disincentives to encourage companies to be clear, complete and honest in writing and sharing their retirement benefit plans. To reverse the Second Circuit would only result in intercession down the road by legislators and regulators—with all the costs and delays (and costs of delays) that would entail.

CONCLUSION

For the foregoing reasons, this Court should uphold the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

RISHI BHANDARI
Counsel of Record
EVAN MANDEL
RUDOLPH DELSON
MANDEL BHANDARI LLP
11 Broadway, Suite 615
New York, New York 10004
212.269.5600

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

SEP 21 2009

No. 08-810

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER, AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,
Petitioners,

v.

PAUL J. FROMMERT ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CHIEF ACTUARIES AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

SRI SRINIVASAN
(Counsel of Record)
IRVING L. GORNSTEIN
MEAGHAN MCLAINE
JUSTIN FLORENCE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY 4

ARGUMENT 5

I. Actuaries Cannot Fulfill Federal Legal Requirements Unless The Provisions In A Given Pension Plan Have A Clear and Uniform Interpretation 5

II. The Failure To Assign A Time Value To Respondents' Lump-Sum Distributions Is Inconsistent With A Fundamental Actuarial Principle 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

STATUTES AND REGULATIONS

26 U.S.C. § 401(a) 9
26 U.S.C. § 404 8
26 U.S.C. § 404(o) 8
26 U.S.C. § 412(a) 6
26 U.S.C. § 414(*l*) 9
26 U.S.C. § 417(e) 14
26 U.S.C. § 430 6
26 U.S.C. § 430(d) 6
26 U.S.C. § 430(i) 7
26 U.S.C. § 436(d) 7
26 U.S.C. § 6057(b) 8
26 U.S.C. § 6058(a) 8
26 U.S.C. § 6058(b) 9
29 U.S.C. § 1021(b) 8
29 U.S.C. § 1021(f) 8
29 U.S.C. § 1023 8
29 U.S.C. § 1023(a) 1, 8
29 U.S.C. § 1023(d) 8
29 U.S.C. § 1024 8
29 U.S.C. § 1082 6
29 U.S.C. § 1083 6
29 U.S.C. § 1083(d) 6
29 U.S.C. § 1132(e) 10
29 U.S.C. § 1242 12
29 U.S.C. § 1302 7
29 U.S.C. § 1306 7

29 U.S.C. § 1307 7
29 U.S.C. § 1310 7
20 C.F.R. § 901.11 1
20 C.F.R. § 901.13 1
20 C.F.R. § 913 1
29 C.F.R. § 2520.103 8
29 C.F.R. part 4006 7
29 C.F.R. part 4007 7
29 C.F.R. part 4010 7
29 C.F.R. part 4041 8

OTHER AUTHORITIES

Actuarial Standards Board, *Actuarial Standard of Practice No. 4: Measuring Pension Obligations and Determining Pension Plan Costs or Contributions* (rev. ed. 2007) 13

Actuarial Standards Board, *Actuarial Standard of Practice No. 27: Selection of Economic Assumptions for Measuring Pension Obligations* (rev. ed. 2007) 13

Department of Labor Form 5500, Schedule SB 8

IRS Form 5310-A 9

Joint Board for the Enrollment of Actuaries et al., *Examination Program* (Sept. 2009) 12

Stephen G. Kellison, *The Theory of Interest* (2d ed. 1991) 13, 14

PBGC Comprehensive Guide 7

PBGC Form 1 7

Charles L. Trowbridge, *Fundamental Concepts of Actuarial Science* (rev. ed. 1989) 12, 13

U.S. Courts, Frequently Asked Questions 10

BRIEF OF CHIEF ACTUARIES AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

Amici curiae respectfully submit this brief in support of neither party, with the written consent of the parties.[1]

INTEREST OF *AMICI CURIAE*

Amici are chief actuaries, or their functional equivalent in those firms that do not use that term, at leading actuarial consulting firms. *Amici* are also "enrolled actuaries." ERISA and other federal laws and regulations impose obligations on enrolled actuaries to assess the financial health of defined benefit pension plans. *See* 29 U.S.C. § 1023(a)(4). Furthermore, enrolled actuaries typically prepare information necessary for the required reporting of those assessments to federal regulators and plan participants. Enrolled actuaries must have substantial "pension actuarial experience," 20 C.F.R. § 913, and must satisfy extensive educational and examination requirements, *id.* §§ 901.11, 901.13.

Amici are recognized in their firms as the preeminent experts in actuarial matters affecting enrolled actuaries and thus have particular expertise in making the assessments required by federal law.

* Tonya B. Manning is the Chief Actuary for Aon Consulting's U.S. Retirement Practice. Her profes-

---

[1] Letters of consent have been filed with the Clerk. No party or counsel for a party to this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their employers, or their counsel has made a monetary contribution to the preparation or submission of this brief.

sional expertise is the modeling, analysis and design of retirement benefits and compliance with ERISA, IRC and accounting standards. Ms. Manning is a Fellow of the Society of Actuaries, an enrolled actuary under ERISA, a Fellow in the Conference of Actuaries and a Member of the American Academy of Actuaries. She is also on the Pension Committee of the Actuarial Standards Board. She is a member of the Board of Directors for the Society of Actuaries and will begin a two-year term as Vice President of the Board next month.

* John H. Moore is the Chief Actuary for J.P. Morgan Compensation and Benefit Strategies. He is responsible for the firm's position on technical and professional matters facing the firm's consulting actuaries. He is an enrolled actuary, a Fellow of the Society of Actuaries, a Member of the American Academy of Actuaries and a Fellow of the Conference of Consulting Actuaries. He also serves on several committees for the American Academy of Actuaries.

* Ethan E. Kra, is a Worldwide Partner and Chief Actuary-Retirement of Mercer (US) Inc., where he consults in the areas of the design and funding of pension and group insurance benefits, structuring and funding of non-qualified pension benefits and the proper accounting for expense of employee benefits. Mr. Kra is a Fellow of the Society of Actuaries, a Member of the American Academy of Actuaries, a Fellow of the Conference of Consulting Actuaries, a Member of the American Society of Pension Professionals & Actuaries and an enrolled actuary. He currently serves as Vice-Chair of the Pension Practice Council of the American Academy of Actuaries.

* Edward W. Brown is the Employee Benefits Practice Director at Milliman He is a Milliman Principal and Consulting Actuary and has been providing actuarial services to corporate, public and not-for-profit clients for over 40 years. He is a Fellow of the Society of Actuaries, an enrolled actuary under ERISA, a Member of the American Academy of Actuaries, and a Fellow of the Conference of Consulting Actuaries.

* Thomas D. Levy has been the Chief Actuary at The Segal Company and Sibson Consulting for 22 years. He is an enrolled actuary and served as the Secretary-Treasurer for the American Academy of Actuaries. He is also a Fellow of the Society of Actuaries, a Member of the American Academy of Actuaries, a Fellow of the Conference of Consulting Actuaries, and a member of the Actuarial Standards Board, where he chaired the Pension Committee and for which he authored the basic U.S. pension practice standard, *Measuring Pension Obligations*.

* Alan Glickstein is Watson Wyatt's national retirement practice leader for policy and process, which is Watson Wyatt's chief actuary equivalent, and is responsible for many of the positions that the firm takes on retirement issues. Mr. Glickstein is a Fellow in the Conference of Actuaries, a Member of the American Academy of Actuaries, an enrolled actuary with the IRS and an Associate of the Society of Actuaries.

* Ken Steiner is the Resource Actuary for Watson Wyatt and is primarily responsible for providing technical and practical guidance to Watson Wyatt retirement actuaries in the United States. Mr. Steiner is a Fellow of the Society of Actuaries, a Fel-

low of the Conference of Consulting Actuaries, a Member of the American Academy of Actuaries, and an enrolled actuary under ERISA. Mr. Steiner has served on several committees and task forces for the American Academy of Actuaries. He has also served as a member of the Board of Governors of the Society of Actuaries, the Pension Committee of the Actuarial Standards Board and the Academy's Council on Professionalism. He is currently a member of the Board of Directors of the American Academy of Actuaries.

As discussed below, *amici* have a significant interest in this case because the decision below makes it impossible for actuaries to perform their legal responsibilities and authorizes a method for calculating distributions that conflicts with a fundamental actuarial principle.

INTRODUCTION AND SUMMARY

As actuaries, *amici* have acquired significant expertise on the issues that arise in connection with the fulfillment of their responsibilities. While *amici* take no position on the specific legal questions presented in this case, they do offer their perspective on two aspects of the decision below. In each case, *amici* draw on their expertise as actuaries.

First, *amici* cannot perform their duties under ERISA unless the provisions that affect the distribution of benefits under a given pension plan have a clear and uniform interpretation. Most important, clear and uniform interpretations are necessary for actuaries to determine a measurement of a plan's benefit liabilities. If the provisions affecting the calculation of benefits in a given plan have different meanings in different jurisdictions, actuaries cannot

precisely measure a plan's liabilities, and their ERISA obligations become impossible to fulfill.

As *amici* understand the rule adopted by the Second Circuit, it leads directly to that result. Under its decision, a district court has wide discretion to give any meaning considered reasonable to a particular plan provision. That approach permits numerous district courts throughout the country to adopt different interpretations of a single plan's provisions, making it impossible for actuaries to perform their legal duties.

Second, consistent with a fundamental actuarial principle, actuaries are required by ERISA, the Internal Revenue Code, and standards of practice issued by the U.S. actuarial profession to account for the time value of money when making certain projections. Actuaries cannot project and compare liabilities and assets over time without assessing how their values change over time. The decision below approves distributions that do not account for the time value of money and is therefore inconsistent with a basic actuarial principle.

ARGUMENT

I. Actuaries Cannot Fulfill Federal Legal Requirements Unless The Provisions In A Given Pension Plan Have A Clear and Uniform Interpretation

Federal law assigns actuaries a series of specific responsibilities for evaluating and reporting on the funded status of defined benefit pension plans. Each of these core obligations requires actuaries to project benefits the plan is expected to pay to participants at various dates in the future. Actuaries cannot do this

unless a given plan's terms—and in particular the plan's benefit terms—have a clear and uniform meaning. The decision below, however, fails to supply that certainty and uniformity.

1. Four of the core tasks that actuaries must perform under ERISA require them to be able to project the benefits that a plan owes to participants and the associated cash flows, and to calculate the current value of those benefits.

* Most fundamentally, actuaries must be able to reasonably project benefits payable under a plan in the future in order to determine the amount of a plan's federally-established funding requirements. ERISA establishes minimum funding standards so that plans will have the funds necessary to pay out the benefits that are owed to participants. 26 U.S.C. § 412(a); 29 U.S.C. § 1082. In order to calculate how much funding a sponsor must provide to the plan—the yearly "minimum required contribution"—actuaries must be able to reliably calculate the value of the projected payments for benefits accrued under the plan as well as calculate the value of benefits accruing during the ensuing year. 26 U.S.C. § 430; 29 U.S.C. § 1083. In addition to calculating a plan sponsor's "minimum required contribution," actuaries must evaluate a plan's overall "funding target attainment percentage"—the ratio between the plan's total assets and the total value of all benefits accrued under the plan. 29 U.S.C. § 1083(d)(2); 26 U.S.C. § 430(d). If this percentage falls below certain limits, federal law prohibits the accrual of additional benefits and restricts the type of payouts the plan can make to participants by, for example, prohibiting accelerated payments such as a lump-sum

distribution. 26 U.S.C. § 436(d). Actuaries must be able to precisely estimate the value of the benefits accrued in order to calculate this percentage. Moreover, actuaries must determine the "at-risk status" of the plan, as this could require accelerated funding of the plan. 26 U.S.C. § 430(i).

* Actuaries also must be able to reasonably measure a plan's benefit payments in order to calculate the plan's liabilities and thus comply with their obligations with respect to the Pension Benefit Guaranty Corporation ("PBGC")—a federal corporation that insures defined benefit pension plans. Sponsors of defined benefit pension plans must make annual premium payments to the PBGC. In turn, if plans terminate without sufficient funds to meet their benefit obligations, the PBGC pays out benefits up to statutory limits. *See* 29 U.S.C. § 1302 *et seq.* Actuaries have several federally-designated functions with respect to the PBGC, each of which requires them to assess the benefits owed under a plan. First, they must calculate and "certify under penalty of perjury" the premium payments the plan owes each year. *See id.* §§ 1306-1307; 29 C.F.R. parts 4006, 4007; PBGC Form 1 (2006), *available at* http://www.pbgc.gov/docs/2006_Form1.pdf. Premiums are determined in part based on an assessment of the plan's future payments to participants based on rules contained in ERISA and associated regulations. *See* PBGC Comprehensive Guide at 16, 21 (2009), *available at* http://www.pbgc.gov/docs/2009_comprehensive_booklet.pdf (describing actuarial calculations). Second, actuaries must make reports to the PBGC about the financial health of certain underfunded and "at-risk" plans. *See* 29 U.S.C. § 1310; 29 C.F.R. part 4010. This obligation also requires

actuaries to be able to reasonably assess the benefits owed to plan participants. Finally, actuaries must make special certifications to the PBGC in connection with plan terminations. *See* 29 C.F.R. part 4041.

* Actuaries must also be able to reasonably assess a plan's obligations to its participants in order to prepare annual reports. ERISA directs sponsors of pension plans to submit an annual report to federal regulators, plan participants, and labor unions representing participants. 29 U.S.C. §§ 1023, 1021(b), (f), 1024; 26 U.S.C. §§ 6057(b), 6058(a). The annual report must include a detailed "actuarial statement" from the enrolled actuary describing the plan's finances and funded status. 29 U.S.C. §§ 1023(a)(4)(B), (d)(3); *see* 29 C.F.R. § 2520.103 *et seq.* In particular, actuaries must provide "[a] statement explaining the actuarial assumptions and methods used in projecting future retirements and forms of benefit distributions under the plan." 29 U.S.C. § 1023(d)(10), (12); *see* Dep't of Labor Form 5500, Schedule SB (2008), *available at* http://www.dol.gov/ebsa/5500main.html.

* Finally, actuaries must be able to reasonably assess the benefits accrued under a plan in connection with employers' decisions about tax deductions. Employer contributions to defined benefit plans are generally tax deductible. The Internal Revenue Code imposes a limit on the amount of contributions that may be deducted in a given year. *See* 26 U.S.C. § 404. The actuary must calculate this limit pursuant to 26 U.S.C. § 404 based in part on the actuary's measurements of the plan's benefits. *Id.* § 404(o). The tax code imposes a wide array of additional re-

quirements on actuaries, many of which require a measurement of plan obligations. *See, e.g.*, 26 U.S.C. §§ 6058(b); 401(a)(12); 414(*l*); IRS Form 5310-A (2006), *available at* http://www.irs.gov/pub/irs-pdf/f5310a.pdf.

Thus, for all four of these core responsibilities, actuaries must be able to reasonably measure a plan's benefits.

2. An actuary cannot reasonably measure a particular plan's benefits unless the benefit provisions in a given plan have a single uniform meaning. *Amici* take no position on whether the source of that single meaning should be a court, a plan administrator, or some other interpretive body. But if there is no one authoritative interpretation of a particular plan's provisions, and different district courts are permitted to give different meanings to the same benefit provision in a single plan, actuaries cannot perform their core responsibilities.

An example based on our understanding of this case illustrates why it is impossible for actuaries to perform their responsibilities if different district courts may give different meanings to the same plan. An actuary evaluating the funded status of the Xerox pension plan would need to project the benefits that are due to various plan participants living in different states. And that calculation would have to take into account those employees who left the company, were given a lump-sum payment, and then were re-hired. If courts in New York offset benefits by only the nominal amount of the prior lump-sum payment, but courts in California offset the accumulated value of the lump-sum payment, actuaries would not know which rule to incorporate into their

projections. The problem would be magnified even more if district courts in Illinois took into account the time value of money, but attached a different value from district courts in California. Indeed, there are 94 federal district courts in the United States. *See* U.S. Courts, Frequently Asked Questions, *available at* http://www.uscourts.gov/faq.html (last visited Sept. 20, 2009). And on an issue like this, many or even all of them might eventually adopt their own approaches to the proper calculation. It is quite possible that participants' benefits will be substantially different under the various approaches.

Actuaries cannot avoid this quagmire by attempting to calculate each particular individual's projected benefit based on the rule of the district court where that individual lives or works. Participants may be able to litigate their benefits in any number of different jurisdictions. *See* 29 U.S.C. § 1132(e)(2) ("Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found."). Thus, a rule that allows different courts to adopt different interpretations of a single provision in a given plan would make it impossible for actuaries to perform their responsibilities. This is true whether the plan involved is a private single-employer plan, as in this case, a multiemployer plan, or a public sector plan.

3. As we understand it, the Second Circuit adopted just such a rule. Under the Second Circuit's

rule, each district court would have discretion to select its own interpretation, subject to review only for "an excess of allowable discretion." Pet. App. 8a, 13a. A district court acts within the bounds of its allowable discretion as long as its interpretation constitutes "one reasonable approach among several reasonable alternatives." *Id.* at 13a-14a. Thus, as we understand it, under the rule adopted by the Second Circuit, different district courts could adopt different reasonable interpretations, and all of them would be upheld. The Second Circuit's rule therefore promotes the very kind of uncertainty and disuniformity that prevents actuaries from doing their jobs.

Amici reiterate that their interest in a legal rule that results in clear and uniform interpretation of a given pension plan is not merely a matter of personal or professional convenience. Enrolled actuaries work according to standards prescribed by federal statutes and regulations, *see supra* at 1, and against the backdrop of laws imposing serious sanctions on actuaries who do not uphold these high standards. *Amici* therefore urge this Court to resolve this case in a manner that fosters clear and uniform interpretations of a given plan's provisions.

II. The Failure To Assign A Time Value To Respondents' Lump-Sum Distributions Is Inconsistent With A Fundamental Actuarial Principle

The decisions below require the plan administrator to calculate respondents' benefits by deducting only the nominal value of their prior distributions—*i.e.*, there is no adjustment to the prior distributions to reflect the passage of time. Pet. App. 8a-9a. Dis-

regarding the time value of money in this way is inconsistent with basic actuarial principles. Indeed, every floor-offset ERISA plan *amici* have encountered to date has included an adjustment for the time value of money in some form. The time value of money must be treated consistently and rationally for actuarial calculations to produce consistent and rational results.

The idea that "money today is 'worth' more than the same amount some time hence" is a fundamental economic principle, and "a fundamental concept of actuarial science." Charles L. Trowbridge, *Fundamental Concepts of Actuarial Science* 27 (rev. ed. 1989). All actuaries "use this concept, together with the concept of probability, in the calculation of actuarial present values." *Id.* The time value of money is therefore a "building block" of actuarial models, *id.*, and one of the "most important tools that actuaries use," *id.* at 33. Consistent with the importance of that concept to actuaries, the qualifying examinations for enrolled actuaries, *see* 29 U.S.C. § 1242, focus heavily on the time value of money, testing knowledge of interest mathematics and related actuarial assumptions. Joint Board for the Enrollment of Actuaries et al., *Examination Program* 1 (Sept. 2009), *available at* http://www.irs.gov/pub/irsutl/ea_program_booklet_fall_ 2009rev.pdf.

Actuaries employ the concept of the time value of money when they assess the adequacy of a plan's funding. *See supra* at 6. To make that assessment, actuaries must project the plan's benefit liabilities and compare them to the plan's current assets. But because money payable at different times "cannot be compared until all the amounts are accumulated or

discounted to a common date," Stephen G. Kellison, *The Theory of Interest* 43 (2d ed. 1991), actuaries discount the plan's projected liabilities to their "present value," *see* Trowbridge, *supra*, at 32-33; *see also* Actuarial Standards Board, *Actuarial Standard of Practice No. 4: Measuring Pension Obligations and Determining Pension Plan Costs or Contributions* § 2.3, at 3 (rev. ed. 2007).[2] That process of discounting accounts for the time value of money, using certain assumptions and methods. Because the value of money changes over time, a plan typically needs considerably less cash on hand *now* than it expects to have to pay *later*.

Actuaries working with floor-offset plans like that at issue also have to account for the time value of money because they typically include the growth of individual account balances among their assumptions. *See* Actuarial Standards Board, *Actuarial Standard of Practice No. 27: Selection of Economic Assumptions for Measuring Pension Obligations* § 3.8.3, at 12 (rev. ed. 2007) (the "growth of individual account balances" is an economic assumption for "plan benefits [that] have components directly related to the accumulation of real or hypothetical individual account balances (e.g., so-called floor-offset arrangements and cash balance plans)"). Thus, had respondents' benefits remained with the plan instead of being distributed to them in cash, an actuary would have accounted for the appreciation of the sums in calculating respondents' accrued benefits. Of course, respondents' benefits did *not* remain in the plan. And the Second Circuit relied on that dif-

---

[2] The Actuarial Standards Board issues standards of practice, which are followed by all actuaries.

ference as a reason for ignoring the time value of money. But from an actuarial perspective, that leads to an irrational result.

An example illustrates the counterintuitive result that the Second Circuit's approach would yield. When an employee opts for a lump-sum distribution, he receives the value of an accrued benefit payable upon retirement, discounted to its present value. Thus, if an employee leaves his company at age 42 with an accrued benefit payable as an annuity beginning at age 65 with a value of $30,000 at age 65, he is entitled to an immediate lump sum distribution of approximately $10,000—$30,000 discounted by 23 years of interest at the rate mandated by 26 U.S.C. § 417(e), which varies depending on the date of distribution and for purposes of this example is assumed to be 5 percent. If the employee returns to the company for a day when he is 65 (and does not accrue a further benefit), the actuarial view is that his benefits have been paid in full. *Cf.* Kellison, *supra*, at 167 (explaining that under the retrospective method of calculating loan balances, "the outstanding loan balance at any point in time is equal to the original amount of the loan accumulated to that date less the accumulated value at that date of all payments previously made"). Under the Second Circuit's view, however, he is entitled to $20,000 for one day of work—the difference between the original accrued benefit accumulated with interest ($30,000) and the prior distribution *not* accumulated with interest ($10,000). In effect, the plan is paying for the time value of money it did not have in its possession, giving it the downside of borrowing (interest owed on the money) without the upside (use of the money),

and giving the employee a windfall. To an actuary, that result makes no sense.

Amici also note that even if the courts below had adopted an approach that was consistent with actuarial principles (*i.e.*, recognizing the time value of money as to the prior distributions), under the Second Circuit's holding there would be many possible approaches for doing so. Thus, there still would be the significant potential that other district courts throughout the United States would adopt other reasonable as well as unreasonable actuarial approaches.

CONCLUSION

For the foregoing reasons, actuaries cannot perform their legal responsibilities unless pension plan provisions in a given plan have a clear and uniform interpretation, and fundamental actuarial principles require them to account for the time value of money.

Respectfully submitted,

SRI SRINIVASAN
(Counsel of Record)
IRVING L. GORNSTEIN
MEAGHAN MCLAINE
JUSTIN FLORENCE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

September 21, 2009

AMICUS CURIAE BRIEF

FILED
SEP 21 2009

(12)

No. 08-810

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, *ET AL.*

Petitioners,

v.

PAUL J. FROMMERT, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* ERISA INDUSTRY COMMITTEE AND AMERICAN BENEFITS COUNCIL IN SUPPORT OF PETITIONERS

HOWARD SHAPIRO
AMY COVERT
HEATHER G. MAGIER
PROSKAUER ROSE LLP
650 Poydras Street
New Orleans, LA 70130
(504) 310-4088

CHRISTOPHER LANDAU, P.C.
Counsel of Record
CRAIG S. PRIMIS, P.C.
ELIZABETH M. LOCKE
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

September 21, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 51RWHØ

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

BACKGROUND 3

SUMMARY OF ARGUMENT 6

ARGUMENT 7

The Second Circuit Erred By Deferring To The District Court, Rather Than The Plan Administrator, In Interpreting An ERISA Plan. 7

A. Deference Is Warranted As A Matter Of Policy 7

B. Deference Is Warranted As A Matter Of Precedent. 13

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Administrative Comm. of the Sea Ray Employees' Stock Ownership & Profit Sharing Plan v. Robinson, 164 F.3d 981 (6th Cir. 1999) 17

Aetna Health Inc. v. Davila, 542 U.S. 200 (2004) 9, 13

Auer v. Robbins, 519 U.S. 452 (1997) 19

Berry v. Ciba-Geigy Corp., 761 F.2d 1003 (4th Cir. 1985) 10, 12

Borda v. Hardy, Lewis, Pollard & Page, P.C., 138 F.3d 1062 (6th Cir. 1998) 17

Central States, S.E. & S.W. Areas Pension Fund v. Central Trans., Inc., 472 U.S. 559 (1985) 7, 11, 14

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) 8

Communications Workers of Am. v. AT&T Co., 40 F.3d 426 (D.C. Cir. 1994) 10

Counts v. Kissack Water & Oil Serv., Inc., 986 F.2d 1322 (10th Cir. 1993) 17

Denver Found. v. Wells Fargo Bank, N.A., 163 P.3d 1116 (Colo. 2007) 14

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 10

Evans v. Eaton Corp. Long Term Disability Plan, 514 F.3d 315 (4th Cir. 2008) 9, 12, 19

Fenster v. Tepfer & Spitz, Ltd.,
301 F.3d 851 (7th Cir. 2002) 16

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989).....13, 15

Fox v. Fox,
167 F.3d 880 (4th Cir. 1999) 17

Hanford v. Clancy,
183 A. 271 (N.H. 1936) 15

Hunter v. Caliber Sys., Inc.,
220 F.3d 702 (6th Cir. 2000) 16

In re Marre's Estate,
114 P.2d 586 (Cal. 1941).....14, 16

In re Sullivan's Will,
12 N.W.2d 148 (Neb. 1943).....14, 15

Ingersoll-Rand Co. v. McClendon,
498 U.S. 133 (1990).....9

Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan,
129 S. Ct. 865 (2009) 9, 19

LaRue v. DeWolff, Boberg & Assocs.,
128 S. Ct. 1020 (2008) 13

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993).....13

Metropolitan Life Ins. Co. v. Glenn,
128 S. Ct. 2343 (2008) 7, 10, 12, 15

Miller v. United Welfare Fund,
72 F.3d 1066 (2d Cir. 1995).....18

Miller v. Xerox Corp. Retirement Income Guarantee Plan,
464 F.3d 871 (9th Cir. 2006) 5, 8

Moench v. Robertson,
62 F.3d 553 (3d Cir. 1995) 17

Negusie v. Holder,
129 S. Ct. 1159 (2009) 18

PBGC v. LTV Corp.,
496 U.S. 633 (1990) 11

Quesinberry v. Life Ins. Co. of N. Am.,
987 F.2d 1017 (4th Cir. 1993) 12

Rekstad v. U.S. Bancorp,
451 F.3d 1114 (10th Cir. 2006) 18

Saffle v. Sierra Pac. Power Co. Bargaining Unit Long Term Disability Income Plan,
85 F.3d 455 (9th Cir. 1996) 17, 18

United McGill Corp. v. Stinnett,
154 F.3d 168 (4th Cir. 1998) 17

Varity Corp. v. Howe,
516 U.S. 489 (1996) 11, 13

Vizcaino v. Microsoft Corp.,
120 F.3d 1006 (9th Cir. 1997) 18

Whisman v. Robbins,
55 F.3d 1140 (6th Cir. 1995) 17

Worthy v. New Orleans S.S. Ass'n,
342 F.3d 422 (5th Cir. 2003) 16

Statutes and Rules

29 U.S.C. § 1104(a) 11

29 U.S.C. § 1144(a) 9

Other Authorities

H.R. Rep. No. 93-533 (1973),
reprinted in 1974 U.S.C.C.A.N. 4639 13

Restatement (Second) of Trusts (1959) 14

Restatement (Third) of Trusts (2003).....14
Restatement (Third) of Trusts (2007).....14

Pursuant to this Court's Rule 37.2, *amici curiae* ERISA Industry Committee ("ERIC") and American Benefits Council (the "Council") respectfully file this brief in support of petitioners.*

INTEREST OF *AMICI CURIAE*

ERIC is a nonprofit organization representing America's largest employers that maintain ERISA-covered pension, healthcare, disability, and other employee benefit plans. These employers provide benefits to millions of active workers, retired persons, and their families nationwide. For this reason, ERIC frequently participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit plan design or administration.[1]

---

* Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici*, their members, or counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court pursuant to this Court's Rule 37.3.

[1] *See, e.g., AT&T Corp. v. Hulteen*, 129 S. Ct. 1962 (2009); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009); *LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020 (2008); *Beck v. PACE Int'l Union*, 551 U.S. 96 (2007); *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

The Council is a broad-based nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 300 members are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering more than 100 million Americans. The Council frequently participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit plan design or administration.[2]

Amici and their members seek to ensure that voluntary employee benefit plans remain a workable and vital feature of the American employment landscape. When courts refuse to defer to a plan administrator's reasonable exercise of discretionary authority, some employers may question the wisdom of continuing to maintain such plans in the future.

---

[2] *See, e.g.*, *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009); *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006); *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004); *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

BACKGROUND

This case presents the question whether a plan administrator's action taken pursuant to an express grant of discretionary authority—whether in the context of a benefits determination or any other task over which the plan gives the administrator discretion—is entitled to judicial deference under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). As a matter of both policy and precedent, the answer is yes.

The Xerox Corporation Retirement Income Guarantee Plan expressly gives the administrator discretion to interpret the plan. J.A. 32-33a ("In the administration of the Plan the Administrator may ... [c]onstrue the Plan and the Trust Agreement thereunder ...."). Included within this grant of discretionary authority is the power to construe the plan terms relating to retirement benefit calculations. *Id.*

Respondents are current and former Xerox employees who left the company and received a lump sum payment of benefits under the Xerox plan. Pet. App. 4a. Each of these individuals was subsequently rehired by Xerox. *Id.* In calculating pension benefits, the plan provides that the plan administrator is to take into account a participant's total years of service at Xerox. *Id.*

To avoid providing respondents a windfall for the initial pre-separation years of service for which they had already received a lump sum payment, the plan required the administrator to reduce the beneficiaries' final pension benefit by an offset amount. *Id.* In accordance with the applicable plan provision, the administrator calculated this offset

based on the amount to which the original lump sum distribution would have grown had it remained invested in the plan during the employee's absence from Xerox. *Id.* at 5a.

Respondents challenged that method of calculating the offset, and the Second Circuit sustained that challenge on the ground that the plan had not adequately disclosed the method until 1998. *Id.* at 51a. In light of that conclusion, the Second Circuit remanded the case to the district court for a new determination of benefits. *Id.* Specifically, the Second Circuit directed the district court to determine the benefits due to respondents based on an "appropriate" calculation. *Id.*

When making the benefits determination on remand, the district court obtained testimony from the plan administrator with respect to how the offset should be calculated without reference to the plan provision that—according to the Second Circuit—had not adequately been disclosed to participants until 1998. *Id.* at 11a, 13a. Specifically, and pursuant to his discretionary authority to interpret the remaining plan terms, the administrator determined the amount of the required offset by calculating the actuarial equivalent of a participant's original lump sum distribution, taking into account the time value of money. J.A. 115-16a.

Respondents again challenged the administrator's calculation, and the district court upheld the challenge. Pet. App. 104a. According to that court, "[t]o the extent that there is some ambiguity as to the precise manner by which prior distributions are to be offset from present benefits, it is Xerox, not the employees who should suffer." *Id.* Thus, the court

adopted respondents' proposed plan interpretation, holding that the plan may offset a rehired participant's final benefit only by the nominal amount of the participant's prior distribution, *without* making any allowance for the time value of money. *Id.* at 107a.

Petitioners appealed that decision to the Second Circuit, which affirmed. *Id.* at 3a. The Court of Appeals did not deny that the administrator's interpretation was reasonable, *see id.* at 13a, and expressly acknowledged that the administrator "had ample opportunity to explain fully [his] approach ... before the District Court, ... in [his] briefs and at oral argument, in a sworn affidavit ..., and in a written report and accompanying testimony from an independent actuary who analyzed the plan administrator's approach." *Id.* at 11a. Nevertheless, the Second Circuit concluded that the administrator's interpretation was not entitled to judicial deference because it was a "mere *opinion*"; the administrator's only "decision" was his original benefit determination, which had been invalidated in the first appeal. *Id.* at 13a (emphasis in original). The Second Circuit thus deferred to the district court's interpretation of the plan. The upshot of that decision is that respondents are entitled to a calculation of benefits that differs from the calculation of benefits proffered by the plan administrator and adopted by the Ninth Circuit *under the same plan*. *See Miller v. Xerox Corp. Retirement Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006).

Petitioners sought a writ of certiorari from this Court, which was granted on June 29, 2009.

SUMMARY OF ARGUMENT

The Second Circuit erred by deferring to the district court, rather than the plan administrator, in interpreting the Xerox plan. In so doing, the Second Circuit effectively replaced the administrator, who acts under the discretionary authority conferred by the plan document, with the district court as the plan's primary decisionmaker. That approach has no basis in either policy or precedent.

With respect to policy, the Second Circuit's approach would foster the disuniformity that ERISA, with its notably powerful preemption provision, was designed to prevent. To allow courts to substitute their own interpretations of a plan for an administrator's reasonable interpretation would make ERISA plans essentially unworkable, as no single person or entity would have primary interpretive authority. Indeed, the Second Circuit's approach would foster litigation as plan participants, dissatisfied with an administrator's interpretation, would shop for a more participant-friendly, if not necessarily more reasonable, judicial interpretation of the plan.

With respect to precedent, this Court has long held that ERISA must be interpreted by reference to the common law of trusts. Under trust law principles, a reviewing court must defer to a trustee's reasonable discretionary decision, even if the court could have rendered an equally reasonable alternative decision. Contrary to the Second Circuit's apparent assumption, this principle applies with full force under ERISA regardless of the context in which an administrator exercises his discretion.

ARGUMENT

The Second Circuit Erred By Deferring To The District Court, Rather Than The Plan Administrator, In Interpreting An ERISA Plan.

The Second Circuit did not and could not deny that the Xerox plan granted the administrator discretionary authority to interpret the plan, and that the administrator's interpretation was reasonable. Accordingly, as a matter of both policy and precedent, the Second Circuit should have deferred to the plan administrator, and erred by deferring instead to the district court.

A. Deference Is Warranted As A Matter Of Policy.

The Second Circuit's refusal to defer to the administrator's reasonable interpretation of the plan, if affirmed, would create insurmountable practical problems for *amici* and their members, and discourage employers from establishing and maintaining voluntary employee benefit plans. Because ERISA's text does not specify the level of judicial deference owed to an administrator's interpretation of a plan, it is entirely appropriate for this Court to consider these policy implications—as indeed this Court has done many times in considering ERISA deference issues. *See, e.g.*, *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2349 (2008); *Central States, S.E. & S.W. Areas Pension Fund v. Central Trans., Inc.*, 472 U.S. 559, 569-70 (1985).

As an initial matter, the Second Circuit's approach would make the uniform administration of

ERISA plans impossible. Instead of allowing an administrator to interpret and "fill in the gaps" in plan language (much as an administrative agency may interpret and "fill in the gaps" in statutory language under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 847 (1984)), that approach would allow individual courts to exercise their own interpretive discretion to fill in those gaps. Given that there are often multiple reasonable interpretations of a plan (just as there are often multiple reasonable interpretations of a statute), the Second Circuit's approach is a recipe for chaos and uncertainty. If a plan administrator's reasonable interpretation is not entitled to deference, a plan's substantive provisions will be subject to different reasonable interpretations, making uniform administration virtually impossible. Thus, for example, a plan beneficiary working in a company's New York office may be entitled to benefits different from those of a colleague working in the Los Angeles office—or, indeed, different from those of another colleague in New York—simply because different courts may interpret the same plan provisions in different, albeit reasonable, ways.

Indeed, this very case highlights the point. If the decision below is allowed to stand, similarly-situated Xerox plan participants will be entitled to different benefits under the same plan depending on whether they are subject to the jurisdiction of the Second Circuit or the Ninth Circuit. *Compare* Pet. App. 13a (upholding the district court's determination that the initial lump sum distribution should be offset by the nominal dollar amount) *with Xerox Corp. Retirement Income Guarantee Plan*, 464 F.3d at 875-76 (considering the same Xerox plan and adopting the

same "actuarial equivalence" method advanced by the plan administrator but rejected by the courts below in this case).

This Court has repeatedly recognized that a paramount congressional goal in enacting ERISA was "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law," so as "to minimize the administrative and financial burden of complying with conflicting directives." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); *see also Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 875-76 (2009) (ERISA "lets employers establish a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims and disbursement of benefits"); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans.").

While that point arises most often in the context of ERISA's broad preemption provision, 29 U.S.C. § 1144(a), it obviously relates as well to the deference issue presented here. "[C]onflicting directives" from different courts, acting as primary ERISA plan decisionmakers, will complicate and raise the expense of plan administration and, in turn, discourage employers from establishing and maintaining ERISA plans. *See, e.g., Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 326 (4th Cir. 2008) (a "cavalier approach to the deference owed ERISA fiduciaries" would disserve plan beneficiaries and result in "lower benefits levels and lower levels of plan formation") (internal quotation omitted). Requiring deference to an administrator's reasonable interpretation of a plan, in contrast,

"encourages employers to provide medical and retirement benefits to their employees through ERISA-governed plans—something they are not required to do." *Glenn*, 128 S. Ct. at 2353 (Roberts, C.J., concurring in part and concurring in the judgment).

Indeed, the Second Circuit's decision, if allowed to stand, can be expected to fuel litigation and undermine informal resolution of disputes over plan terms. ERISA "was designed to promote internal resolution of claims, to permit broad managerial discretion on the part of pension plan trustees in formulating claims procedures, and to encourage informal and non-adversarial proceedings." *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1007 n.4 (4th Cir. 1985) (internal quotation omitted); *see also Egelhoff v. Egelhoff*, 532 U.S. 141, 149-50 (2001) (same). For just this reason, ERISA beneficiaries generally must exhaust their administrative remedies before bringing a claim. *See, e.g., Communications Workers of Am. v. AT&T Co.*, 40 F.3d 426, 432 (D.C. Cir. 1994). "Much like the exhaustion doctrine in the context of judicial review of administrative agency action, the exhaustion requirement in the ERISA context serves several important purposes. By preventing premature judicial interference with a pension plan's decisionmaking processes, the exhaustion requirement enables plan administrators to apply their expertise and exercise their discretion to manage the plan's funds, correct errors, make considered interpretations of plan provisions, and assemble a factual record that will assist the court reviewing the administrators' actions." *Id.*

Increased litigation costs, of course, can be expected to lead employers either to cut benefits or to terminate employee benefit plans altogether. The Xerox plan, like all plans governed by ERISA, is maintained on a voluntary basis. Indeed, one of Congress' primary goals in enacting ERISA was to encourage employers to offer such voluntary plans. *See, e.g., PBGC v. LTV Corp.*, 496 U.S. 633, 648 (1990). It hardly furthers that goal to allow courts to ignore a plan administrator's concededly reasonable interpretation of a plan. *See, e.g., Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (noting that Congress sought to create a regulatory regime "that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place").

And there is no reason to suppose that judicial deference to plan administrators will lead to abuse. Plan administrators, after all, act as fiduciaries when exercising their discretionary authority. *See, e.g., Central States,* 472 U.S. at 570 n.10; *see also* 29 U.S.C. § 1104(a)(1)(A) (requiring plan administrator to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ... for the exclusive purpose of providing benefits to participants and their beneficiaries; and ... defraying reasonable expenses of administering the plan"); *id.* § 1104(a)(1)(B) (requiring plan administrator to "discharge his duties with respect to a plan ... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims"). For this reason, among others, this Court concluded

in *Glenn* that a plan administrator's discretionary decisions were entitled to deference even where the administrator may have a conflict of interest; a fiduciary must be presumed to act in the best interests of the beneficiaries. *See* 128 S. Ct. at 2350.

The bottom line from a policy perspective is that plan administrators, not courts, have the necessary expertise in interpreting and applying plan terms. *See, e.g., Evans*, 514 F.3d at 323 (noting "the plan administrator's greater experience and familiarity with plan terms and provisions"); *Berry*, 761 F.2d at 1006 (noting the greater institutional competence plan administrators possess relative to federal courts within their area of expertise). By deferring to the district court instead of the administrator, the Second Circuit disregarded that expertise and improperly "transfer[red] ... the administration of benefit and pension plans from their designated fiduciaries to the federal courts." *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1022 (4th Cir. 1993); *see also id.* ("[S]uch a substitution of authority is plainly what the formulated standards of ERISA are intended to prevent.") (internal citation omitted). Deference to the reasonable interpretation of a plan administrator, as opposed to any other reasonable interpretation, "ensure[s] that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional," *Berry*, 761 F.2d at 1006, and thus "safeguard[s] the superior vantage points of those entrusted with primary decisional responsibility," *Evans*, 514 F.3d at 321.

B. Deference Is Warranted As A Matter Of Precedent.

Judicial deference to a plan administrator's reasonable interpretation or application of a plan is warranted not only as a matter of policy, but also as a matter of precedent. ERISA has now been on the books for more than three decades, and has been construed frequently by this Court and other federal courts. The principles that emerge from these cases compel deference to a plan administrator's reasonable interpretation or application of a plan.

For present purposes, the key principle is that courts must interpret and apply ERISA by reference to the common law of trusts. "The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts." H.R. Rep. No. 93-533, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649. Accordingly, "courts are to develop a federal common law of rights and obligations under ERISA-regulated plans ... guided by principles of trust law." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (internal quotations omitted); *see also LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020, 1024 n.4 (2008) (noting that common law of trusts "informs [judicial] interpretation of ERISA's fiduciary duties"); *Davila*, 542 U.S. at 218-19 (relying on common law of trusts to determine whether benefits determination was fiduciary act); *Varity*, 516 U.S. at 496-97 (relying on common law of trusts to inform interpretation of ERISA fiduciary provisions); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255-56 (1993) (relying on common law of trusts to determine scope of available

equitable relief under ERISA); *Central States*, 472 U.S. at 570-72 (relying on common law of trusts, and noting its express invocation by Congress when enacting ERISA, to determine whether audit by ERISA plan was permitted by governing documents).

As relevant here, the common law of trusts requires courts to defer to a trustee's reasonable determination rendered within the scope of his discretionary authority. *See, e.g.*, *Restatement (Third) of Trusts* § 87 (2007) ("When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion."); *Restatement (Third) of Trusts* § 50(1) (2003) ("A discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee."); *Denver Found. v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1123 (Colo. 2007) ("An arbitrary and capricious benchmark restrains the exercise of our independent review and interpretation save for instances of abuse of discretion, bad faith, dishonesty, or arbitrary action."); *see also id.* ("'The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power ....'") (quoting *Restatement (Second) of Trusts* § 187 cmt. e (1959)); *In re Sullivan's Will*, 12 N.W.2d 148, 151 (Neb. 1943) (where a trust grants discretion to the trustee, "the court has no authority to substitute its judgment for that of the trustees"); *In re Marre's Estate*, 114 P.2d 586, 590-91 (Cal. 1941) ("It is well settled that the courts will not attempt to exercise discretion which

has been confided to a trustee ...."); *Hanford v. Clancy*, 183 A. 271, 272-73 (N.H. 1936) (a court may not disturb a trustee's reasonable exercise of discretionary powers).

This Court has previously recognized that this deferential standard of review from trust law also applies in the ERISA context:

> Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers. ... A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable.

Firestone, 489 U.S. at 111; *see also Glenn*, 128 S. Ct. at 2350 (noting that there is "no reason to forsake *Firestone*'s reliance upon trust law" in analyzing the appropriate level of judicial deference to a plan administrator).

The lesson from the common law, in other words, is that "judicial intervention is not warranted merely because the court would have differently exercised [its] discretion." *Restatement (Third) of Trusts* § 87 (2007). And where a court concludes that a trustee has abused his discretion, "the court should take appropriate action to curb the trustee, but [the court] may not exercise discretion for [the trustee]." *Hanford*, 183 A. at 272; *see also id.* at 272-73 (noting that a court may only enter "[a]ffirmative orders of disposition" if "there is but one reasonable disposition possible," and that "[i]f more than one reasonable disposition could be made, then the trustee must make the choice"); *see also Sullivan's Will*, 12 N.W.2d at 41 ("[T]he court cannot act for the

trustee or do anything other than prescribe the minimum or maximum limits within which the trustees must act and compel such action within such limits."); *Marre's Estate*, 114 P.2d at 590-91 (if court concludes that trustee abused his discretion, court should order trustee to make a new determination).

In light of these common law principles, the Second Circuit erred by holding that deference to the administrator was unwarranted here because (1) "the administrator had previously construed the same terms and we found such a construction to have violated ERISA" because it was not properly disclosed to plan participants, and (2) "the District Court ... had no *decision* to review" on remand, but only "the mere *opinion* of the plan administrator" expressed in the course of litigation. Pet. App. 13a (emphasis added). Following trust law principles, plan administrators are entitled to judicial deference over *all* matters in which they are vested with discretionary authority, regardless of the context in which they exercise that authority.[3]

---

[3] *See, e.g., Worthy v. New Orleans S.S. Ass'n*, 342 F.3d 422, 427-28 (5th Cir. 2003) (applying abuse of discretion review to uphold administrator's interpretation of plan language regarding amendment requirements); *Fenster v. Tepfer & Spitz, Ltd.*, 301 F.3d 851, 856 (7th Cir. 2002) (applying arbitrary and capricious standard applied to assess administrator's determination regarding validity of plan amendment); *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 710-12 (6th Cir. 2000) (applying arbitrary and capricious review to claim that defendants violated § 204(g) of ERISA and finding "no barrier to application of the arbitrary and capricious standard in a case such as this not involving a typical review of denial of

In particular, as most relevant here, plan administrators are entitled to judicial deference even where a court has concluded that a previous discretionary decision violated ERISA and therefore a new calculation of benefits was necessary. *See, e.g., Saffle v. Sierra Pac. Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455, 460 (9th Cir. 1996). Thus, "[i]t is not the court's function *ab initio* to apply the correct [plan interpretation] to [the participant's] claim. That function, under the

---

benefits"); *Administrative Comm. of the Sea Ray Employees' Stock Ownership & Profit Sharing Plan v. Robinson*, 164 F.3d 981, 986-87 (6th Cir. 1999) (applying arbitrary and capricious review applied to plan administrator's determination of whether partial plan termination occurred); *Fox v. Fox*, 167 F.3d 880, 883-84 (4th Cir. 1999) (applying abuse of discretion review to a qualified domestic relations order determination as part of a divorce judgment); *United McGill Corp. v. Stinnett*, 154 F.3d 168, 170-71 (4th Cir. 1998) (applying deferential review to uphold plan administrator's strict application of plan's subrogation provisions); *Borda v. Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1065-69 (6th Cir. 1998) (applying deferential review to uphold plan administrator's determination that former employee did not have "affected employee" status and thus was not entitled to disbursement of unvested funds upon plan termination); *Moench v. Robertson*, 62 F.3d 553, 565 (3d Cir. 1995) (trust law should guide the standard of review over claims alleging breach of ERISA fiduciary duties); *Whisman v. Robbins*, 55 F.3d 1140, 1144 (6th Cir. 1995) (applying abuse of discretion standard applied to claim alleging improper suspension of benefits under ERISA § 203(a), which permits employers to deny payments to a participant who is of qualifying retirement age but otherwise employed); *Counts v. Kissack Water & Oil Serv., Inc.*, 986 F.2d 1322, 1324 (10th Cir. 1993) (applying arbitrary and capricious standard of review to claim alleging violation of ERISA § 204, which prohibits the elimination of a lump sum payment option).

Plan, is reserved to the Plan administrator." *Id.* at 461. If and when a court concludes that an administrator's discretionary decision violates ERISA, the court may not usurp that discretion for itself, but must allow the administrator to exercise that discretion anew in compliance with the statute.

The court may allow the administrator to exercise that discretion by remanding the case to the administrator. *See id.* (directing district court to "remand [to the plan administrator] for reevaluation of the merits of a claim"); *see also Pakovich v. Broadspire Servs., Inc.*, 535 F.3d 601, 607 (7th Cir. 2008); *Rekstad v. U.S. Bancorp*, 451 F.3d 1114, 1121 (10th Cir. 2006); *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1013-14 (9th Cir. 1997); *Miller v. United Welfare Fund*, 72 F.3d 1066, 1073-74 (2d Cir. 1995). Again, administrative law offers a helpful analogy: the general rule is that courts remand to an agency after vacating a discretionary agency decision. *See, e.g., Negusie v. Holder*, 129 S. Ct. 1159, 1167 (2009).

By the same token, the court may allow the administrator to exercise that discretion by soliciting or accepting the administrator's views in the context of the litigation (as happened here). *See, e.g., Oliver v. Coca-Cola Co.*, 546 F.3d 1353, 1354 (11th Cir. 2008) (remanding to the district court with instructions to allow the plan administrator "to fully brief" the proper plan interpretation). Thus, the dispositive distinction posited by the Second Circuit between "a decision" by the administrator and "an opinion" of the administrator, *see* Pet. App. 13a, is illusory: the context in which the court receives the administrator's views is immaterial, as long as the court provides the administrator with an opportunity

to express those views, and thereby to exercise his discretionary authority in the first instance. *See id.* Yet again, administrative law offers a helpful analogy: an agency's interpretation of a statute is eligible for deference even if set forth for the first time in a brief. *See, e.g.*, *Kennedy*, 129 S. Ct. at 872 n.7; *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

In short, the Second Circuit "forg[o]t its duty of deference and its secondary rather than primary role in determining a claimant's right to benefits." *Evans*, 514 F.3d at 323. Because the Xerox plan administrator has discretion to interpret the plan, and because the administrator's interpretation here was reasonable, that interpretation is entitled to judicial deference.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

Respectfully submitted,

HOWARD SHAPIRO
AMY COVERT
HEATHER G. MAGIER
PROSKAUER ROSE LLP
650 Poydras Street
New Orleans, LA 70130
(504) 310-4088

CHRISTOPHER LANDAU, P.C.
Counsel of Record
CRAIG S. PRIMIS, P.C.
ELIZABETH M. LOCKE
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

September 21, 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
NOV 2 0 2009
OFFICE OF THE CLERK

No. 08-810

In The
Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,
Petitioners,

v.

PAUL J. FROMMERT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DONALD T. BOGAN
UNIVERSITY OF OKLAHOMA
COLLEGE OF LAW
300 TIMBERDELL RD.
NORMAN, OK 73019
(405) 325-4699

PAUL M. SECUNDA
Counsel of Record
9062 N. Lake Drive
Bayside, WI 53217
(414) 352-9554

T.C. #19
SCANNED

Counsel for Amici Curiae, Law Professors

November 20, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. The Court Should Reject Petitioners' Effort to Engage in Serial Attempts to Reinterpret its Pension Plan 7

II. The Court Should Reject Petitioners' Attempt to Introduce Administrative Law Deference into the ERISA Benefit Claims Process 9

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Brown v. Blue Cross & Blue Shield of Alabama, Inc., 898 F.2d 1556 (11th Cir. 1990) 11

Central Laborers' Pension Fund v. Heinz, 541 U.S. 739 (2004) 8-9

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 3, 11

Herzberger v. Standard Insurance Co., 205 F.3d 327 (7th Cir. 2000) 10

Krolnik v. Prudential Insurance Co., 570 F.3d 841 (7th Cir. 2009) 6, 12

Mead v. Tilley, 490 U.S. 714 (1989) 5, 9

Metropolitan Life Insurance Co. v. Glenn, 128 S. Ct. 2343 (2008) 5, 11

Perlman v. Swiss Bank Corporation Comprehensive Disability Protection Plan, 195 F.3d 975 (7th Cir. 1999) 10

Ramsey v. Hercules, Inc., 77 F.3d 199 (7th Cir. 1996) 6, 13

Van Boxel v. The Journal Co. Employee Employee Pension Trust, 836 F.2d 1048 (7th Cir. 1987) 5, 11, 12

Wilkins v. Baptist Healthcare System, Inc., 150 F.3d 609 (6th Cir. 1998) 10

Statutes

29 U.S.C. 1132(a)(1)(B) 2
29 U.S.C. 1154(g) 7

Legislative Materials

S. 1179, 93d Cong. § 602 (1973) 13
S. Rep. No. 93-383 (1973) 13
120 Cong. Record 29,563 (1973) 13
120 Cong. Record 29,941 (1974) 13
119 Cong. Record 30,401 (1973) 13
H.R. 2, 93d Cong. (1974) 13

Other Authorities

Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986) 10

Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727 (2004) 5, 9, 13

John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315 (2007) .. 10

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511 10

Paul M. Secunda, *Inherent Attorney Conflicts of Interest under ERISA: Using the Model Rules of Professional Conduct to Discourage Joint Representation of Dual Role Fiduciaries*, 39 J. MARSHALL L. REV. 721 (2006) 11

INTEREST OF *AMICI CURIAE*

Amici curiae respectfully submit this brief in support of respondents, Paul J. Frommert et al., encouraging the affirmance of the judgment of the United States Court of Appeals for the Second Circuit, because the judgment is consistent with the language and intent of the ERISA statute and with this Court's precedent.[1]

Amici are law professors[2] at nine law and business schools throughout the United States who teach and write about ERISA rights and remedies.[3] More

---

[1] This brief is submitted with the consent of the parties. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party and no party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. The names of educational institutions are provided for identification purposes only.

[2] Paul M. Secunda is an Associate Professor of Law at Marquette University Law School; Donald T. Bogan is a Professor of Law at the University of Oklahoma College of Law; Mark D. DeBofsky is an Adjunct Professor of Law at The John Marshall Law School; Susan J. Stabile is the Robert and Marion Short Distinguished Chair in Law at the University of St. Thomas School of Law; Lawrence A. Frolik is a Professor of Law at the University of Pittsburgh School of Law; David Pratt is a Professor of Law at Albany Law School; Susan Harthill is an Associate Professor of Law at the Florida Coastal Law School; Dana M. Muir is the Thurnau Professor of Business Law at the Ross School of Business at the University of Michigan, and Elizabeth Pendo is a Professor of Law at the Saint Louis University School of Law.

[3] A representative sample of *Amici* writings include: David Pratt, *Retirement in a Defined Contribution Era: Making the*

(continued...)

specifically, *Amici* teach, study and comment on the law surrounding ERISA remedies, the denial of employee benefit claims under ERISA Section 502(a)(1)(B) [29 U.S.C. § 1132(a)(1)(B)], and on the limits of judicial deference.

Amici have no financial stake in the outcome of this case but are interested in ensuring a uniform and coherent interpretation of the Employee Retirement Income Security Act of 1974. We file this brief to urge this Court not to import inappropriate administrative law deference principles into ERISA denial of benefits cases. We are prompted to submit this brief because the decision in this case will have wide-ranging consequences for tens of millions of American workers

---

(...continued)

Money Last, 42 JOHN MARSHALL L. REV. (forthcoming 2009); Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L. J. (forthcoming 2009); Elizabeth Pendo, *Working Sick: Lessons of Chronic Illness for Health Care Reform*, 9 YALE J. HEALTH POL'Y L. & ETHICS 453 (2009); Susan Harthill, *A Square Peg in a Round Hole: Make Whole Relief Under ERISA § 502(a)(3)*, 61 OKLA. L. REV. 721 (2009); Lawrence A. Frolik & Kathryn L. Moore, LAW OF EMPLOYEE PENSION AND WELFARE BENEFITS (2d ed. 2008); Susan J. Stabile & Jayne Zanglein, ERISA LITIGATION HANDBOOK (3d ed. 2008); Mark D. DeBofsky, *What Process is Due in the Adjudication of ERISA Claims*, 41 J. MARSHALL L. REV. 811 (2007); Donald T. Bogan & Benjamin Fu, *ERISA: No Further Inquiry into Conflicted Plan Administrator Claim Denials*, 58 OKLA. L. REV. 637 (2005); Donald T. Bogan, *ERISA: Rethinking* Firestone *in Light of* Great-West*—Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims*, 37 J. MARSHALL L. REV. 629 (2004); Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727 (2004); Dana Muir, *ERISA Remedies: Chimera or Congressional Compromise*, 81 IOWA L. REV. 1 (1995).

and the trillions of dollars they save and invest in pension plans. These consequences could substantially impact the standard of living of millions of future retirees.

SUMMARY OF ARGUMENT

Congress enacted ERISA "to promote the interests of employees and their beneficiaries in employee benefit plans . . . and to protect contractually defined benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989) (internal citations omitted). *Firestone* permitted, within the scope of trust law, circumstances that would allow a plan sponsor to obtain deferential court review of plan administrator claim denials. *See Firestone*, 489 U.S. at 115 ("Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.").

Applying the *Firestone* trust law-based arbitrary and capricious standard of review, the Second Circuit Court of Appeals held under a plenary standard, but also under a deferential standard of review, that Petitioners' interpretation of the Xerox pension plan so as to incorporate a "phantom account" offset was an abuse of discretion. Disagreeing with the Second Circuit's interpretation of the limits of permissible deference under ERISA, Petitioners seek to add another layer of deference to the incongruous application of trust law deference in ERISA benefits cases, by introducing even less applicable principles of

administrative law deference into ERISA. This Court should reject Petitioners' attempt to obtain *another* deferential review, now under an administrative law-based application, after the Second Circuit already ruled twice that Petitioners' interpretation of the plan was an abuse of discretion under the *Firestone* trust law-based deferential review standard.

Because this case comes with the complicated background of two separate Second Circuit Court of Appeals opinions (plus various other related opinions), it is important to clarify what the Second Circuit held in its first opinion because that holding provides the rule of the case for purposes of this appeal. In its initial *Frommert* opinion, the Second Circuit held that even under an abuse of discretion standard, Petitioners' pre-1998 imposition of the phantom account offset without plan language permitting such an offset was an abuse of discretion. See *Frommert I*, 433 F.3d 254, 265-66 (2d Cir. 2006) (*Frommert I*) ("It is clear, under either an arbitrary or capricious standard or as a matter of law, that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable."). The *Frommert I* ruling remanded the matter for calculation of benefits due under equitable considerations; and the district court's ruling that Xerox could only properly offset the monies actually paid was affirmed by the Second Circuit in the second appeal of the case. See *Frommert v. Conkright*, 535 F.3d 111 (2d Cir. 2008) (*Frommert II*). Having lost in *Frommert I* under the trust law abuse of discretion standard, Petitioners continue to seek deference to a position that is not even a plan interpretation since no plan language prior to 1998 even supported Xerox's position.

Because the Second Circuit previously rejected Petitioners' interpretation of the operative pre-1998 Plan documents under the *Firestone* trust law-based deferential review standard as being unreasonable, the only new deference theory Petitioners' can be advancing here is an administrative law-based deference, where courts may respect or credit an agency's advocacy position. See, e.g., *Mead v. Tilley*, 490 U.S. 714, 722 (1989) (ERISA case where Court deferred to the advocacy position of the Pension Benefit Guaranty Corporation presented in an *amicus* brief).

Lower federal courts applying *Firestone* have often confused trust law deference in ERISA claims with the kind of deference courts extend to administrative agencies. See Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727 (2004). Especially after the recognition of a plan administrator's structural conflict of interest in *Metropolitan Life Ins. Co. v. Glenn*, 552 U.S. 1161 (2008), in situations where the plan administrator both determines eligibility to receive benefits and is the source of the benefits themselves, this Court should clarify that ERISA plan administrators are not the equivalent of agency officials; that they are not administrative law judges; and that administrative law deference has no place in the ERISA claims process (except in the rare situation of when a court is reviewing an interpretation of the Department of Labor or the PBGC). See *Van Boxel v. The Journal Co. Employees Pension Trust*, 836 F.2d 1048, 1050 (7th Cir. 1987) (Posner, J.) ("Pension fund trusts are not administrative agencies and most of the decisions they make are not discretionary in the sense,

familiar from administrative law, of decisions that make policy under a broad grant of delegated powers. Certainly in such a case as the present one, pension fund trustees are not policy-makers; they are interpreters of contractual entitlements."). See also *Krolnik v Prudential Ins. Co.*, 570 F.3d 841, 843 (7th Cir. 2009) (in a case where the plan sponsor had not granted the plan administrator discretionary authority, Chief Judge Easterbrook remarked: "[W]hat *Firestone* requires is not "**review**" of any kind; it is an independent *decision* rather than "**review**" that *Firestone* contemplates.") (emphasis in original); *Ramsey v. Hercules, Inc.* 77 F.3d 199, 205 (7th Cir. 1996) ("Underlying the deferential review that fact findings of [administrative agencies] enjoy is a well established set of procedural protections that stem from the Constitution and individual statutes. Plan administrators, in contrast, neither enjoy the acknowledged expertise that justifies deferential review for agency cases . . . nor are they unbiased fact finders like the courts.").

In short, the Court should not permit administrative law deference in judicial review of ERISA benefit claims determinations. Instead, the Court should affirm the decision of the Second Circuit Court of Appeals in this case.

ARGUMENT

I. THE COURT SHOULD REJECT PETITIONERS' EFFORT TO ENGAGE IN SERIAL ATTEMPTS TO REINTERPRET ITS PENSION PLAN.

In its initial *Frommert* opinion, the Second Circuit Court of Appeals applied trust law deference in reviewing the former Xerox workers' challenge to Petitioners' denial of the workers' pension benefits claims. The Second Circuit, overturning the District Court, ruled that the 1998 Restatement of the Plan (which included language that arguably incorporated the "phantom account offset") constituted an unlawful amendment to the plan. See *Frommert v. Conkright*, 433 F.3d 254, 263 (2d Cir. 2006) (*Frommert I*).[4] Most importantly for purposes of the arguments presented by Petitioners to this Court, the Second Circuit also expressly held that Petitioners' interpretation of the plan documents made in the context of determining the workers eligibility for benefits—that the pre-1998 plan language included the phantom account offset—was an abuse of discretion. See *Frommert I*,

---

[4] The Second Circuit held that to interpret the 1998 Restatement of the Plan to include the "phantom account offset" would constitute an unlawful amendment because it operated to impermissibly reduce Respondent's benefits in violation of ERISA's anti-cutback provision (29 U.S.C. § 1154(g)). See *Frommert I*, 433 F.3d at 263. That holding necessarily incorporates the underlying assumption (which the Second Circuit also went on to expressly hold) that the pre-1998 plan documents did not include the phantom account offset; otherwise, the amendment would not have violated ERISA's anti-cutback provision. The Second Circuit also held that the plan administrator violated ERISA by failing to give proper notice to Respondents of its intent to amend the plan. See *id.*

433 F.3d at 265-66 ("It is clear, under either an arbitrary or capricious standard or as a matter of law, that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable.").

Having lost *Frommert I* under the arbitrary and capricious review standard, Petitioners now seek judicial deference to their *litigation position*.[5] They inexplicably urge the very same interpretation—pushing again the phantom account offset method—that the Second Circuit found unreasonable in 2006. Petitioners do not identify any theory of law to support this new argument for deference.

Petitioners' approach in this case is an example *par excellence* of giving the plan administrator a second bite at the apple. In fact, based on the Petitioners' theory in this case, they appear to contemplate serial attempts of interpreting the plan until they can convince a court that their interpretation is no longer arbitrary and capricious. *Amici* believe strongly that such a race-to-the-bottom not only disserves employees like Respondents in this case, but is also contrary to the very purposes of ERISA - to protect "employees' justified expectations of receiving the benefits their employers promise them." *Central Laborers' Pension*

[5] To be absolutely clear, *Amici* do not regard this case as a *Firestone* case. *Firestone* deference has already been exercised and the court's judgment was that it was exercised in an abuse of permissible discretion. The only issue now is whether to add another administrative law-based deference to the ERISA claims process by treating Xerox's plan administrator as a type of quasi-administrative agency.

Fund v. Heinz, 541 U.S. 739, 743 (2004). See also DeBofsky, *supra*, at 749 ("A law designed for the protection of plan participants and their beneficiaries fails to meet that goal where plan administrators are given multiple opportunities to shore up a defective record and benefits due are either delayed or denied."). It also takes place against a background where employees who are retired or close to retirement do not have the luxury to wait until the plan administrator finally gets it right. In this case alone, many of the original Respondents have already passed away during the now ten years of this litigation.

II. THE COURT SHOULD REJECT PETITIONERS' ATTEMPT TO INTRODUCE ADMINISTRATIVE LAW DEFERENCE INTO THE ERISA BENEFIT CLAIMS PROCESS.

Since the Second Circuit previously rejected Petitioners' interpretation of the operative pre-1998 Plan documents under a *Firestone*-based analysis as being unreasonable and outside the scope of permissible discretionary authority, the only new deference theory Petitioners could advance here is an administrative law-based deference, where courts may respect or credit an agency's advocacy position. See, e.g., *Mead v. Tilley*, 490 U.S. 714, 722 (1989) (ERISA case where Court deferred to the advocacy position of the Pension Benefit Guaranty Corporation presented in an *amicus* brief).

Lower federal courts applying *Firestone* have confused deference in ERISA claims with the kind of deference courts extend to administrative agencies. See DeBofsky, *supra*, at 730-31 ("[T]he federal courts

have mistakenly incorporated administrative law principles into ERISA benefit decisions. The use of the term "administrator" in the ERISA statute has allowed other terminology to creep into ERISA, such as "administrative record."). See also John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1332-33 (2007).

In particular, when federal courts employ the summary "record review" process, see, e.g., *Wilkins v. Baptist Healthcare System, Inc.* 150 F.3d 609, 618 (6th Cir.1998) (limiting their review of ERISA cases to the administrative record), they confuse adjudicative deference common under administrative law, see Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN L. REV. 363 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, with fiduciary deference under trust law. See *Herzberger v. Standard Insurance Co.*, 205 F.3d 327, 332 (7th Cir. 2000) (Posner, J.) ("The Social Security Administration is a public agency that denies benefits only after giving the applicant an opportunity for a full adjudicative hearing before a judicial officer, the administrative law judge. The procedural safeguards thus accorded, designed to assure a full and fair hearing, are missing from determinations by plan administrators."). See also *Perlman v. Swiss Bank Corporation Comprehensive Disability Protection Plan*, 195 F.3d 975, 983-30 (7th Cir. 1999) (Wood, J., dissenting) ("The difference between decisions made by private actors such as ERISA plans and public agencies such as SSA is the reason that the Supreme Court has instructed the lower courts to 'develop a federal common law of

rights and obligations under ERISA-regulated plans,' rather than import wholesale a body of administrative law.") (quoting *Firestone*, 489 U.S. at 110).

Amici believe that the Eleventh Circuit Court of Appeals in *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990), correctly understood the proper distinction between the ERISA framework and administrative deference principles. That court "expressed caution . . . at wholesale importation of administrative agency concepts into the review of ERISA fiduciary decisions," recognizing that the "[u]se of the administrative agency analogy may, ironically, give too much deference to ERISA fiduciaries." *Id.* at 1564 n.7. This is because decisions in benefits denial cases "involve the interpretation of contractual entitlements; they 'are not discretionary in the sense, familiar from administrative law, of decisions that make policy under a broad grant of delegated powers.'" *Id.* (quoting *Van Boxel*, 836 F.2d at 1050). Even more problematic is the reality that plan administrators face inherent conflicts that do not exist in administrative agencies. Cf. *Metropolitan Life Ins. Co. v. Glenn*, 552 U.S. 1161 (2008). See also Paul M. Secunda, *Inherent Attorney Conflicts of Interest under ERISA: Using the Model Rules of Professional Conduct to Discourage Joint Representation of Dual Role Fiduciaries*, 39 J. MARSHALL L. REV. 721, 730-733 (2006) (discussing the inherently conflicted state of dual-role fiduciaries). Consequently, *Amici* agree with the finding in *Brown* that administrative deference principles are inappropriate in evaluating the application of the abuse of discretion standard in the ERISA denial of benefits context.

Instead, this Court should clarify that ERISA plan administrators are not agency officials, that they are not comparable to administrative law judges, and that administrative law deference has no place in the ERISA claims process (except, perhaps, if the court is reviewing an interpretation of the Department of Labor or the PBGC). In fact, this Court has scrupulously used the term "abuse of discretion" rather than the administrative law standard of "arbitrary and capricious." For instance, the recent *Glenn* case follows the trust law abuse of discretion standard based on the Supreme Court's continued reliance on trust law in assessing ERISA claims. *Glenn*, 128 S. Ct. at 2348.

Consistent with this view, Judge Richard Posner wrote in *Van Boxel v. The Journal Co. Employees Pension Trust*, 836 F.2d 1048, 1050 (7th Cir. 1987):

> Pension fund trusts are not administrative agencies and most of the decisions they make are not discretionary in the sense, familiar from administrative law, of decisions that make policy under a broad grant of delegated powers. Certainly in such a case as the present one, pension fund trustees are not policy-makers; they are interpreters of contractual entitlements.

See also *Krolnik v Prudential Ins. Co.*, 570 F.3d 841, 843 (7th Cir. 2009) (in a case where the plan sponsor had not granted the plan administrator discretionary authority, Chief Judge Frank Easterbrook remarked: "[W]hat *Firestone* requires is not "**review**" of any kind; it is an independent *decision* rather than "**review**" that *Firestone* contemplates.") (emphasis in original);

Ramsey v. Hercules, Inc. 77 F.3d 199, 205 (7th Cir. 1996) (noting that *Firestone* cases are not appeals from the ruling of an Administrative Law Judge); DeBofsky, *supra*, at 740 ("The ERISA statute's use of some of the same nomenclature utilized in administrative law has undoubtedly confused the courts and has led to an overly restrictive scope of review even when a deferential standard of review is compelled.").

To be clear, ERISA never contemplated plan administrators and plans be vested with discretion as broad as that enjoyed by agencies. In fact, the Senate Finance Committee initially recommended that administrative adjudicatory authority be granted to the Department of Labor under ERISA. See S. 1179, 93d Cong. § 602, at 209-11 (1973), *reprinted in* 1 Leg. Hist. 780, 988-90; S. REP. NO. 93-383 at 116-17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4999-5000, and *reprinted in* 1 Leg. Hist. 1184-85. After the Senate initially rejected this Finance Committee proposal, a later attempt to reinsert the administrative adjudication provision was also defeated. See 120 CONG. REC. 29,563 (1973), *reprinted in* 1 Leg. Hist. 1245-47; 119 CONG. REC. 30,401 (1973), *reprinted in* 2 Leg. Hist. 1835-38. The delegation of adjudicatory authority did not appear in the final Senate Bill submitted to Congress, and of course, does not appear in ERISA. Furthermore, Congress also rejected a proposal to allow arbitration of employee benefit claims, in favor of establishing claimants' right to bring a civil action to pursue an employee benefit claim in federal district court. See H.R. 2, 93d Cong. § 691, at 566-67 (1974), *reprinted in* 3 Leg. Hist. 3813-14; 120 CONG. REC. 29,941 (1974) (remarks of Sen. Javits), *reprinted in* 3 Leg. Hist. 4769.

Legislative history could therefore not be clearer that Congress never intended plan administrators to hold the same discretionary authority as agency officials to whom administrative deference is due. This Court should therefore refuse Petitioners' invitation to extend inapplicable administrative law principles into the ERISA framework.

CONCLUSION

For the reasons set forth above, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

Paul M. Secunda
Counsel of Record
9062 N. Lake Dr.
Bayside, WI 53217
(414) 352-9554

November 20, 2009

AMICUS CURIAE BRIEF

No. 08-810

Supreme Court, U.S.
FILED
NOV 20 2009
CLERK

In The
Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER, AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

JEFFREY GREG LEWIS
Counsel of Record
TERESA S. RENAKER
LINDSAY NAKO
JAMES P. KEENLEY
LEWIS, FEINBERG, LEE, RENAKER & JACKSON, P.C.
1330 Broadway, Suite 1800
Oakland, CA 94612
(510) 839-6824

REBECCA M. HAMBURG
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
44 Montgomery St., Suite 2080
San Francisco, CA 94104

LYNN L. SARKO
DEREK W. LOESER
KARIN BORNSTEIN SWOPE
KELLER ROHRBACK LLP
1201 Third Ave., Suite 3200
Seattle, WA 98101

Counsel for Amicus Curiae National Employment Lawyers Association

November 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. REQUIRING JUDICIAL DEFERENCE TO PLAN INTERPRETATIONS ARRIVED AT OUTSIDE THE CLAIM PROCESS WOULD UNDERMINE THE CLAIM PROCESS AND FRUSTRATE ERISA'S POLICY GOALS 5

A. The Claim Process Promotes Efficient Resolution of Benefits Claims, Minimizing Administrative and Financial Burdens on Plans and Participants . 5

B. The Department of Labor Recognizes That Deferential Review Should Not Be Required for Benefit Decisions Reached Outside the Claim Process.... 8

C. The Lower Courts Repeatedly Hold That in Adjudicating 29 U.S.C. § 1132(a)(1)(B) Claims, Judicial Deference Is Not Required Where a Plan Interpretation Is Reached for the First Time Outside the Claim Process 9

TABLE OF CONTENTS – Continued

Page

D. An Affirmative Answer to the First Question Presented Would Render the Claim Process Ineffective, Defeat the Purposes of Exhaustion, Increase Litigation, Drive Up Plan Costs, and Deprive Participants of ERISA-Mandated Protections 14

E. This Court's Decisions Do Not Require Deference Under the Circumstances of This Case 16

F. Remand to the Plan Administrator Is Only Appropriate When It Will Preserve the Integrity of the Claims Process 18

II. THE DISTRICT COURT SHOULD NOT BE REQUIRED TO DEFER TO THE PLAN ADMINISTRATOR'S PROPOSED REMEDY FOR ITS OWN STATUTORY VIOLATION 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) 24

Auer v. Robbins, 519 U.S. 452 (1997) 9

Baker v. Big Star Div. of the Grand Union Co., 893 F.2d 288 (11th Cir. 1989) 12

Buffonage v. Prudential Ins. Co. of America, 426 F.3d 20 (1st Cir. 2005) 21

Burke v. PriceWaterHouseCoopers LLP Long Term Disability Plan, 572 F.3d 76 (2d Cir. 2009) 12

Central Laborers' Pension Fund v. Heinz, 541 U.S. 739 (2004) 1

Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985) 17

Chevron v. Natural Res. Def. Council, Inc., 476 U.S. 837 (1984) 9

Chronister v. Unum Life Ins. Co. of Am., 563 F.3d 773, 775 (8th Cir. 2009) 13

Conley v. Pitney Bowes, 176 F.3d 1044 (8th Cir. 1999) 11

DeGrado v. Jefferson Pilot Financial Ins. Co., 451 F.3d 1161 (10th Cir. 2006) 21

Dishman v. Unum Life Ins. Co. of Am., 269 F.3d 974 (9th Cir. 2001) 11

TABLE OF AUTHORITIES – Continued

Page

Downie v. Independent Drivers Ass'n Pension Plan, 934 F.2d 1168 (10th Cir. 1991) 25

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 1, 3, 10, 16

Freeman v. Nat'l Broad. Co., 80 F.3d 78 (2d Cir. 1996) 9

Frommert v. Conkright, 433 F.3d 254 (2d Cir. 2006) 3, 18, 23

Frommert v. Conkright, 535 F.3d 111 (2d Cir. 2008) 5, 23, 26

Gilbertson v. Allied Signal, Inc., 328 F.3d 625 (10th Cir. 2003) 7, 12

Glista v. Unum Life Ins. Co. of Am., 378 F.3d 113 (1st Cir. 2004) 11

Gritzer v. CBS, Inc., 275 F.3d 291 (3d Cir. 2002) 12

Grossmuller v. Int'l Union, 715 F.2d 853 (3d Cir. 1983) 20, 23

Hackett v. Xerox Corp. Long-Term Disability Income Plan, 315 F.3d 771 (7th Cir. 2003) 21, 22

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 8

Jebian v. Hewlett-Packard Employee Benefits Org. Income Protection Plan, 349 F.3d 1098 (9th Cir. 2003) 12, 13

King v. Hartford Life & Acc. Ins. Co., 414 F.3d 994 (8th Cir. 2005) 10, 20, 23

TABLE OF AUTHORITIES – Continued

Page

LaMantia v. Voluntary Plan Admins., Inc., 401 F.3d 1114 (9th Cir. 2005) 13

LaRue v. DeWolff, Boberg & Assocs., 552 U.S. 248 (2008) 1

Makar v. Health Care Corp. of Mid-Atl., 872 F.2d 80 (4th Cir. 1989) 7

Mansker v. TMG Life Ins. Co., 54 F.3d 1322 (8th Cir. 1995) 12

Marolt v. Alliant Techsystems, Inc., 146 F.3d 617 (8th Cir. 1998) 10

Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 8

Matuszak v. Torrington Co., 927 F.2d 320 (7th Cir. 1991) 10

McGarrah v. Hartford Life Ins. Co., 234 F.3d 1026 (8th Cir. 2000) 13

Metropolitan Life Ins. Co. v. Glenn, 128 S. Ct. 2343 (2008) 16, 17

Miller v. United Welfare Fund, 72 F.3d 1066 (2d Cir. 1995) 20

Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995) 17

Nelson v. EG&G Energy Measurements Group, Inc., 37 F.3d 1384 (9th Cir. 1994) 11

Nichols v. Prudential Ins. Co. of Am., 406 F.3d 98 (2d Cir. 2005) 12

Patterson v. Hughes Aircraft Co., 11 F.3d 948 (9th Cir. 1993) 20

TABLE OF AUTHORITIES – Continued

Page

Quinn v. Blue Cross & Blue Shield Ass'n, 161 F.3d 472 (7th Cir. 1998) 21

Rasenack ex rel. Tribolet v. AIG Life Ins. Co., ___ F.3d ___, 2009 WL 3526490 (10th Cir. Nov. 2, 2009) 12

Richardson v. Cent. States Se. & Sw. Areas Pension Fund, 645 F.2d 660 (8th Cir. 1981) 7, 15

Rodriguez-Abreu v. Chase Manhattan Bank, N.A., 986 F.2d 580 (1st Cir. 1993) 11

Ross v. Rail Car America Group Disability Income Plan, 285 F.3d 735 (8th Cir. 2002) 3

Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002) 1

Saffle v. Sierra Pacific Power Co. Bargaining Unit Long Term Disability Plan, 85 F.3d 455 (9th Cir. 1996) 19, 20, 23

Sanford v. Harvard Indus., Inc., 262 F.3d 590 (6th Cir. 2001) 11, 14

Seman v. FMC Corp. Ret. Plan for Hourly Employees, 334 F.3d 728 (8th Cir. 2003) 13

Sharkey v. Ultramar Energy Ltd., 70 F.3d 226 (2d Cir. 1995) 11

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 8

Shelby County Health Care Corp. v. Majestic Star Casino, 581 F.3d 355 (6th Cir. 2009) 11

Strom v. Siegel Fenchel & Peddy P.C. Profit Sharing Plan, 497 F.3d 234 (2d Cir. 2007) 12

TABLE OF AUTHORITIES – Continued

Page

Univ. Hosps. of Cleveland v. Emerson Elec. Co., 202 F.3d 839 (6th Cir. 2000) 10, 12

UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358 (1999) 1, 11

Varity Corp. v. Howe, 516 U.S. 489 (1996) 1, 2

Zervos v. Verizon New York, Inc., 277 F.3d 635 (2d Cir. 2002) 22

STATUTES

29 U.S.C. § 1054(g) 3

29 U.S.C. § 1054(h) 3, 23

29 U.S.C. § 1132(a)(1)(B) ..... *passim*

29 U.S.C. § 1132(a)(3) 2, 3, 24

29 U.S.C. § 1133 ..... 6, 7, 8, 16

ERISA § 204(g) 3, 18

ERISA § 204(h) 18, 23, 24

ERISA § 502(a)(1)(B) ..... *passim*

ERISA § 502(a)(3) 2, 9, 24

ERISA § 503 ..... 6, 16

TABLE OF AUTHORITIES – Continued

Page

RULES & REGULATIONS

Sup. Ct. R. 37.6 1

29 C.F.R. § 2560.503-1 6

29 C.F.R. § 2560.503-1(b)(2) 6

29 C.F.R. § 2560.503-1(g) 7

29 C.F.R. § 2560.503-1(g)(1)(iv) 6

29 C.F.R. § 2560.503-1(h) 7

29 C.F.R. § 2560.503-1(j)(4) 6

29 C.F.R. § 2560.503-1(l) 9

29 C.F.R. § 2560.503-1(m) 7

65 Fed. Reg 70246-01 ..... 9, 16

65 Fed. Reg. 70251 ..... 9, 16

INTEREST OF THE *AMICUS*[1]

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys committed to working for those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. For example, NELA filed or participated in filing *amicus curiae* briefs in this Court in *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989); *Varity Corp. v. Howe,* 516 U.S. 489 (1996); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004); and *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008).

Regarding the first question presented, in NELA's view, mandatory judicial deference is not warranted under the circumstances of this case for two reasons.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no person or entity other than *amicus curiae* and its undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party to this matter authored this brief in whole or in part. The parties have separately consented to the filing of this brief.

First, where the claim is one for benefits under 29 U.S.C. § 1132(a)(1)(B), requiring judicial deference to a plan interpretation articulated by the administrator for the first time outside the ERISA-mandated claim process would undermine both the protections afforded by that process to plan participants and the effectiveness of the process in promoting efficient resolution of benefit claims. Second, where a benefit claim arises from a statutory violation, mandatory judicial deference would undermine the statutory remedies for such violations and the discretion granted to district courts to implement statutory remedies.

For these reasons, *amicus* respectfully requests that the Court consider its views in support of Respondents.

SUMMARY OF ARGUMENT

This case comes before the Court in an unusual posture. Respondents originally filed claims under two subsections of ERISA's civil enforcement provision: ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), which authorizes, *inter alia*, a claim for appropriate equitable relief from a violation of the statute; and ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which provides for, *inter alia*, a claim for benefits owing to a participant under the terms of a plan. *See Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996). The Second Circuit found that Respondents' employer, Xerox, had failed to comply with ERISA's requirement for advance

notice of plan amendments that reduce future pension benefit accruals and had violated ERISA's prohibition on retroactive pension benefit cutbacks. *Frommert v. Conkright*, 433 F.3d 254, 266-68 (2d Cir. 2006) ("*Frommert I*"); *see* ERISA § 204(g), (h), 29 U.S.C. § 1054(g), (h).

Notwithstanding that Section 1132(a)(3), by its terms, would seem to be the obvious choice to remedy a statutory violation – through appropriate equitable relief – the Second Circuit upheld the dismissal of Respondents' Section 1132(a)(3) claim and instead remanded for the district court to fashion relief under Section 1132(a)(1)(B). *Frommert I*, 433 F.3d at 268-70. In contrast, other courts addressing similar circumstances have held that equitable relief in the form of reformation or an injunction mandating that a plan term be given a specific meaning, to be followed by a Section 1132(a)(1)(B) claim for benefits under that plan term, is the proper course. *See Ross v. Rail Car America Group Disability Income Plan*, 285 F.3d 735, 740-41 (8th Cir. 2002). In this case, however, the Second Circuit chose to combine these two steps into one under Section 502(a)(1)(B). *Frommert I*, 433 F.3d at 269. As a result, this is not a typical Section 1132(a)(1)(B) case: it is not a claim for pension, disability, health, or severance benefits under the established terms of a plan. *Cf. Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008).

Nonetheless, the first question presented to this Court, whether a district court must defer to an

ERISA plan administrator's interpretation of the terms of the plan arrived at outside the context of an administrative claim for benefits, is framed extremely broadly. As a result, this Court's answer to the first question potentially affects a wide-ranging class of garden-variety benefits claims, placing in jeopardy a well-established body of law respecting the question of deference.

Based on this settled body of law and the policy considerations supporting ERISA's claim process for benefit claims, the first question presented should be answered in the negative as to the type of claim at issue in this case: a claim for benefits pursuant to 29 U.S.C. § 1132(a)(1)(B).[2] The ERISA-mandated claim process plays a critical role in facilitating resolution of claims and – for those claims not resolved in the claim process – developing a record for efficient judicial review. The claim process achieves this goal by requiring that a plan administrator clearly articulate the rationale for a claim denial, permit the participant to review pertinent documents, and allow the participant to challenge the denial by an appeal. The lower courts have enforced these requirements, and thereby promoted the effective use of the claim process, by requiring that plan participants exhaust this process before seeking judicial review of their claims and by refusing to defer to plan administrator

---

[2] In the context of other claims authorized by ERISA's civil enforcement provision, this case presents no occasion for this Court to consider the availability of deference.

determinations arrived at outside the confines of this process. By declining to defer to plan interpretations reached outside this process when adjudicating benefits claims, courts promote the efficient use of the claim process and enable the claim process to perform these important functions. Thus, the Second Circuit correctly held that, on a claim for benefits under 29 U.S.C. § 1132(a)(1)(B), a court need not defer to a plan interpretation arrived at by a fiduciary outside this process. *Frommert v. Conkright*, 535 F.3d 111, 119 (2d Cir. 2008) ("*Frommert II*"). Additionally, mandatory judicial deference should play no role where, as here, a benefits claim arises from a violation of the statute that carries with it a statutory remedy. For these reasons, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. REQUIRING JUDICIAL DEFERENCE TO PLAN INTERPRETATIONS ARRIVED AT OUTSIDE THE CLAIM PROCESS WOULD UNDERMINE THE CLAIM PROCESS AND FRUSTRATE ERISA'S POLICY GOALS.

A. The Claim Process Promotes Efficient Resolution of Benefits Claims, Minimizing Administrative and Financial Burdens on Plans and Participants.

In the context of a claim for benefits, a plan administrator's discretionary authority to interpret

the plan is exercised through the claim process mandated by 29 U.S.C. § 1133.[3] This claims procedure provision and the Department of Labor regulations issued thereunder[4] require that employee benefit plans establish and follow reasonable procedures for the adjudication of claims and appeals. The claim procedure must be set forth in the plan documents and reiterated in notices of adverse benefit determinations sent to participants. 29 C.F.R. § 2560-503.1(b)(2), (g)(1)(iv), (j)(4). First and foremost, the claim process requires that for every denied benefit claim, the plan administrator clearly communicate its reasons for denying the claim, afford the participant access to the documents and information that form the basis of the denial, permit the participant to appeal the denial to an appropriate named fiduciary and, if the denial is affirmed on appeal, clearly

---

[3] ERISA § 503 provides as follows:

> In accordance with regulations of the Secretary, every employee benefit plan shall –
>
> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C. § 1133.

[4] 29 C.F.R. § 2560.503-1.

explain the rationale for the affirmance. 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1(g), (h), (m).

The purpose of the claim process has been summarized as follows: "to minimize the number of frivolous ERISA lawsuits; promote the consistent treatment of benefit claims; promote a nonadversarial dispute resolution process; and decrease the cost and time of claims settlement." *Makar v. Health Care Corp. of Mid-Atl.*, 872 F.2d 80, 83 (4th Cir. 1989) (citation omitted). To ensure that the claim process can effectively serve these functions, the circuits have unanimously held that a participant must exhaust these procedures before a claim for benefits can be brought under 29 U.S.C. § 1132(a)(1)(B).

At the same time, the claim process is designed to foster a "meaningful dialogue" between plan administrators and participants regarding benefits claims. *See Gilbertson v. Allied Signal, Inc.*, 328 F.3d 625, 635 (10th Cir. 2003) ("ERISA's procedural regulations are meant to promote accurate, cooperative, and reasonably speedy decision-making, not to generate an endless stream of business for employment lawyers."). The requirement that plan administrators clearly inform participants of the basis for a claim denial ensures that participants can adequately "prepare for any further administrative review, as well as an appeal to the federal courts." *Richardson v. Cent. States Se. & Sw. Areas Pension Fund*, 645 F.2d 660, 665 (8th Cir. 1981). The claim process also assists courts by defining and refining contested issues and establishing a claim record, facilitating

efficient judicial review of claims not resolved in the claim process. In this way, the claim process advances two of the core public policy goals of ERISA and the federal common law created thereunder: to facilitate the provision of benefits to employees by minimizing the administrative and financial burdens of benefit plans, and to establish the minimum procedural and substantive safeguards. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). As discussed below, the effectiveness of the claim process in achieving these goals would be severely undermined were courts adjudicating benefits claims required to defer to plan interpretations arrived at by plan administrators outside of this process.

B. The Department of Labor Recognizes That Deferential Review Should Not Be Required for Benefit Decisions Reached Outside the Claim Process.

In promulgating its claim procedure regulation under 29 U.S.C. § 1133, the Secretary of Labor has explained that no deference is due to a plan administrator's discretionary decision unless the decision is reached in compliance with the claim process. The regulations specify that if a plan fails to establish or follow claim procedures consistent with the regulations, a participant "shall be deemed to have exhausted the administrative remedies available under the plan and shall be entitled to pursue any available

remedies under section 502(a)." 29 C.F.R. § 2560.503-1(l). The Secretary's preamble to the regulations explains that this provision is intended "to clarify that the procedural minimums of the regulation are essential to procedural fairness and that a decision made in the absence of the mandated procedural protections should not be entitled to any judicial deference." (65 Fed. Reg. 70246, 70255 n. 39 (Nov. 21, 2000). Thus, the Secretary of Labor recognizes that in relation to claims for benefits, deferential review should not be required for plan interpretations reached outside the claim process.[5]

C. The Lower Courts Repeatedly Hold That in Adjudicating 29 U.S.C. § 1132(a)(1)(B) Claims, Judicial Deference Is Not Required Where a Plan Interpretation Is Reached for the First Time Outside the Claim Process.

Recognizing the importance of maintaining the integrity of the claim process, the circuit courts have

---

[5] Regulations enacted pursuant to the Department's rule-making authority "have the force of law . . . and are to be given controlling weight unless they are found to be arbitrary, capricious, or manifestly contrary to the statute." *Freeman v. Nat'l Broad. Co.*, 80 F.3d 78, 82 (2d Cir. 1996) (citing *United States v. Nixon*, 418 U.S. 683, 695 (1974)); *Chevron v. Natural Res. Def. Council, Inc.*, 476 U.S. 837, 843-44 (1984). The Department's interpretations of its own regulations are generally entitled to deference as well. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

repeatedly held that judicial deference is not required where a plan interpretation was reached for the first time outside the claim process. *See Matuszak v. Torrington Co.*, 927 F.2d 320, 323 (7th Cir. 1991) ("This Court would emasculate ERISA's disclosure requirement if it were to defer to reasons that the Board first identified on appeal in the District Court, years after the decision at issue. No plan can authorize such a result, so *Firestone* requires that we review the Board's decision *de novo.*"); *Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 620 (8th Cir. 1998) ("We will not permit ERISA claimants denied the timely and specific explanation to which the law entitles them to be sandbagged by after-the-fact plan interpretations devised for purposes of litigation."); *see also Univ. Hosps. of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 849 n. 7 (6th Cir. 2000) ("[I]t strikes us as problematic to, on one hand, recognize an administrator's discretion to interpret a plan by applying a deferential 'arbitrary and capricious' standard of review, yet, on the other hand, allow the administrator to 'shore up' a decision after-the-fact by testifying as to the 'true' basis for the decision after the matter is in litigation").[6]

---

[6] Indeed, some circuit courts have refused to even consider – much less defer to – rationales for claim denials that do not appear in the administrative record. *King v. Hartford Life & Accident Ins. Co.*, 414 F.3d 994, 999-1000 (8th Cir. 2005) ("When reviewing a denial of benefits by an administrator who has discretion under an ERISA-regulated plan, a reviewing court 'must focus on the evidence available to the plan administrators

(Continued on following page)

Where an administrator with discretion attempts to adopt in litigation a rationale articulated in the claim process by another entity, the courts of appeal have held that deference is not required because the administrator failed to exercise its discretion during the claim process. *See Shelby County Health Care Corp. v. Majestic Star Casino, LLC*, 581 F.3d 355, 365 (6th Cir. 2009) ("Where a plan administrator does not make the benefits decision, the plan administrator has not exercised its discretionary authority, and therefore a deferential standard of review is not justified.").[7]

---

at the time of their decision and may not admit new evidence or consider *post hoc* rationales.' "); *Glista v. Unum Life Ins. Co. of Am.*, 378 F.3d 113, 132 (1st Cir. 2004) ("Under these circumstances, we think the 'appropriate equitable relief' is to hold Unum to the basis that it articulated in its internal claims review process for denying benefits. . . . In addition to driving up the cost of proceedings, Unum's failure [to raise additional rationales in the claims process] may well have prevented a more efficient resolution of this case."); *Dishman v. Unum Life Ins. Co. of Am.*, 269 F.3d 974, 986-87 (9th Cir. 2001) ("[T]he fact that UNUM may be able, post-hoc, to offer a legally plausible justification for its termination of Dishman's benefits is irrelevant."); *Conley v. Pitney Bowes*, 176 F.3d 1044, 1048-49 (8th Cir. 1999) ("It is true that in reviewing a denial of benefits under an employee welfare plan subject to ERISA, a court must focus on the evidence available to the plan administrators at the time of their decision and may not admit new evidence or consider *post hoc* rationales.").

[7] *See also Sanford v. Harvard Indus., Inc.*, 262 F.3d 590, 597 (6th Cir. 2001); *Sharkey v. Ultramar Energy Ltd.*, 70 F.3d 226, 229 (2d Cir. 1995); *Nelson v. EG&G Energy Measurements Group, Inc.*, 37 F.3d 1384, 1389 (9th Cir. 1994); *Rodriguez-Abreu*

(Continued on following page)

Likewise, courts have declined to defer to benefit decisions reached outside claim process deadlines imposed by plan or the regulations, again because the purportedly discretionary plan interpretation was not reached during the claim process. *See Gritzer v. CBS, Inc.*, 275 F.3d 291, 296 (3d Cir. 2002) ("Where a trustee fails to act or to exercise his or her discretion, de novo review is appropriate because the trustee has forfeited the privilege to apply his or her discretion; it is the trustee's analysis, not his or her right to use discretion or a mere arbitrary denial, to which a court should defer.").[8]

To be sure, some courts have accorded deference where a plan administrator, although technically out of compliance with claim procedure requirements, has nonetheless acted in such a way as to promote the goals of the claim process. *See Gilbertson v. Allied Signal, Inc.*, 328 F.3d 625, 634 (10th Cir. 2003)

---

v. Chase Manhattan Bank, N.A., 986 F.2d 580, 584 (1st Cir. 1993); *Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288, 290-91 (11th Cir. 1989) (as amended Jan. 29, 1990).

[8] *See also Rasenack ex rel. Tribolet v. AIG Life Ins. Co.*, ___ F.3d ___, 2009 WL 3526490, *3, *5 (10th Cir. Nov. 2, 2009); *Burke v. PriceWaterHouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76, 80 (2d Cir. 2009); *Strom v. Siegel Fenchel & Peddy P.C. Profit Sharing Plan*, 497 F.3d 234, 243-44 (2d Cir. 2007); *Nichols v. Prudential Ins. Co. of Am.*, 406 F.3d 98, 109 (2d Cir. 2005); *Jebian v. Hewlett-Packard Employee Benefits Org. Income Protection Plan*, 349 F.3d 1098, 1104, 1108 (9th Cir. 2003); *Gilbertson*, 328 F.3d at 631-32; *Univ. Hosps. of Cleveland*, 202 F.3d at 846 n. 3; *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1328 (8th Cir. 1995).

("Courts have also been willing to overlook administrators' failure to meet certain procedural requirements when the administrator has substantially complied with the regulations and the process as a whole fulfills the broader purposes of ERISA and its accompanying regulations.").[9] But all of these courts recognize the paramount importance of fostering effective use of the claim process by participants and plan administrators by limiting judicial deference in circumstances where discretion has not been exercised during the claim process. *See Jebian v. Hewlett-Packard Employee Benefits Org. Income Protection Plan*, 349 F.3d 1098, 1108 (9th Cir. 2003) ("The prospect of de novo review of untimely decisions should therefore only spur administrators into producing timely, reasoned decisions – exactly what ERISA aims to achieve.").[10]

---

[9] *See also LaMantia v. Voluntary Plan Admins., Inc.*, 401 F.3d 1114, 1123-24 (9th Cir. 2005); *Seman v. FMC Corp. Ret. Plan for Hourly Employees*, 334 F.3d 728, 733 (8th Cir. 2003); *McGarrah v. Hartford Life Ins. Co.*, 234 F.3d 1026, 1031 (8th Cir. 2000), *abrogated on other grounds by Chronister v. Unum Life Ins. Co. of Am.*, 563 F.3d 773, 775 (8th Cir. 2009).

[10] The existence of the claim process defeats analogies to trust law in answering the first question presented. Petitioners admit that the trust law authorities on which they rely arise from a system that lacks ERISA's pre-litigation claim process for benefit claims. "Indeed, under the law of trusts, there is no analogue to the administrative claims process in which ERISA benefits are originally determined." (Pet. Br., at 33.) As a result, trust law principles that contemplate that a trustee's discretion to interpret will be exercised for the first time in litigation have no relevance to this case. ERISA benefit claims arise under a

(Continued on following page)

In sum, "deferential review under the 'arbitrary and capricious' standard is merited for decisions regarding benefits *when they are made in compliance with the plan procedures*." *Sanford*, 262 F.3d at 597 (emphasis added). To promote the effective use of the claim procedures, this Court should decline to hold that in the benefit claim context, courts must always defer to a plan administrator's determination without regard to whether it was reached in the claim process.

D. An Affirmative Answer to the First Question Presented Would Render the Claim Process Ineffective, Defeat the Purposes of Exhaustion, Increase Litigation, Drive Up Plan Costs, and Deprive Participants of ERISA-Mandated Protections.

As the cases cited above recognize, the claim process cannot serve its salutary purposes if courts, in deciding claims under 29 U.S.C. § 1132(a)(1)(B), must disregard the results of the claim process and instead defer to an interpretation by a plan administrator with discretion regardless of the circumstances under which the interpretation was rendered. Requiring deference in the situation contemplated by the first question presented would frustrate rather

---

regime that contemplates the opposite: that plan interpretations relating to benefit claims will be arrived at and articulated in the claim process.

than further the salutary effect of the claim process. A requirement that courts adjudicating benefit claims defer to plan interpretations arrived at for the first time in litigation would reduce the incentive for plan administrators to reach a reasoned decision in the claim process. Such a rule would encourage sloppy decisionmaking and inadequate notice to participants, promoting litigation. *See Richardson*, 645 F.2d at 664 ("While we have no desire to complicate the lives of the Trustees, or to require a lengthy reasoned opinion in every case, we do feel that the Trustees are obligated to briefly state the facts of the case and the rationale for their decision. In this way, the Trustees may begin to build a body of precedent that will ultimately bring about a form of consistency otherwise lacking in the administration of the Fund.").

Requiring deference to plan interpretations raised for the first time in litigation would also undermine ERISA's goal to provide for procedural fairness and consistent plan application. Plan administrators would be encouraged to take extreme or experimental positions during the claim process, confident that if these positions are ultimately found to be arbitrary and capricious, the court will be required to defer to a subsequent interpretation. Nor would mandatory deference sought by Petitioners further consistent plan interpretations, at least at the claim level, because plan administrators would have no need to ensure that their interpretations were consistent and

complete prior to litigation.[11] The claim process simply cannot serve its salutary purpose if it is effectively optional for plan administrators, in that they are not bound by plan interpretations they reach in the claim process.

E. This Court's Decisions Do Not Require Deference Under the Circumstances of This Case.

As the cases cited above demonstrate, this Court's decisions do not require judicial deference in the context of a 29 U.S.C. § 1132(a)(1)(B) claim where a plan interpretation has been rendered outside the claim process. *Glenn* addresses discretionary determinations on benefits claims that were the product of pre-litigation decision-making. *See* ERISA § 503, 29 U.S.C. § 1133 (prescribing claim process for benefits claims); *Glenn*, 128 S. Ct. at 2350 (discussing how conflict of interest should be weighed as a factor "on judicial review of a discretionary benefit determination"); *see also Firestone*, 489 U.S. at 1115 (holding that the default standard of review for benefit claim denials is de novo review). *Firestone* and

---

[11] The claims process is intended to ensure consistent plan interpretations and the regulations require that "a plan's claims procedures must include administrative safeguards and processes designed to ensure and to verify . . . that, where appropriate, the plan provisions have been applied consistently with respect to similarly situated claimants." 65 Fed. Reg. 70246-01, 70251.

Glenn have nothing to say on the question whether, in applying a plan term, a court is obligated to afford deference to an administrator's newly-minted determination reached outside the claim process. Likewise, *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985), cited by Petitioners, where this Court accorded "significant weight" to a trustee's interpretation of plan terms as conferring a right to conduct an audit, does not involve a benefit claim subject to the claim process or judicial review under ERISA § 502(a)(1)(B). *Id.* at 568. For the same reason, cases in the lower courts that extend *Firestone* deference to certain non-benefits determinations have no application here. *See, e.g., Moench v. Robertson*, 62 F.3d 553, 564-66 (3d Cir. 1995) (holding that under certain circumstances, deferential review may apply to plan investment decisions alleged to be breaches of fiduciary duty). Conversely, the question in this case, which is before the Court as a benefit claim case, is whether deferential review is required for plan interpretations reached outside the claim process. Thus, *Moench* and similar case law also relied upon by Petitioners have no bearing on the question of whether deferential review is appropriate to non-benefit determinations.

F. Remand to the Plan Administrator Is Only Appropriate When It Will Preserve the Integrity of the Claims Process.

In order to preserve the integrity of the claims process, courts should not be required to remand issues to the plan administrator that have already been subject to that process. The lower courts have developed a body of law addressing when remand to the administrator is an appropriate remedy following an arbitrary and capricious claim decision: remand is appropriate to ensure that participants receive a full and fair review process or to fully develop factual issues, but it is not appropriate to resolve legal issues or where the evidence compels only one reasonable conclusion. In the present case, after the Court of Appeals rejected Petitioners' original plan interpretation as arbitrary and capricious and its attempted amendment as a violation of ERISA §§ 204(h) and 204(g), something had to be done to determine the proper interpretation of the plan so as to provide the participants with the correct benefits, and the district court was instructed to craft an appropriate remedy. *Frommert I*, 433 F.3d at 268. *Amici* for Petitioners have suggested that the proper course of action was to remand the issue to the plan administrator. Brief for *Amicus Curiae* ERISA Industry Committee at 17-18. But this solution is inefficient, undermines the court's ability to bring finality to the litigation, and is contrary to well-established law under ERISA § 502(a)(1)(B). Courts remand matters to the plan to

preserve the integrity of the claims process and promote efficient claims resolution, not to rehash issues that have already been subject to that process.

Section 502(a)(1)(B) itself provides the basic remedy for an arbitrary and capricious plan decision because it explicitly empowers courts to directly enforce the terms of the plan by ordering that benefits be paid according to the terms of the plan. 29 U.S.C. § 1132(a)(1)(B). But, in some situations, ordering benefit payments is premature or otherwise inefficient without first remanding undecided issues back to the plan administrator. For example, in *Saffle v. Sierra Pacific Power Co. Bargaining Unit Long Term Disability Plan*, the Ninth Circuit found that the plan administrator had abused its discretion by imposing a benefits eligibility requirement that could not be squared with the plain language of the plan terms. 85 F.3d 455, 460-61 (9th Cir. 1996). But because the claims process and subsequent litigation had been premised on a faulty understanding of the plan, the court instructed that the claim should be remanded to the plan administrator for further claims procedures consistent with the court's interpretation of the plan. *Id.* Importantly, the *Saffle* court did not remand the issue on which the plan had already reached an arbitrary interpretation – whether the plan incorporated reasonable accommodations into the standard of disability – rather, it decided that issue and remanded so that the participant could pursue her claim based on the correct interpretation. *Id.* Similarly, the Third Circuit held that where a plan

abused its discretion and violated ERISA by failing to have an adequate review process for adverse benefits determinations, the underlying question of the participant's eligibility should be determined by the plan in the first instance, but only *after* the district court had approved the adoption of appropriate claim procedures. *Grossmuller v. Int'l Union*, 715 F.2d 853, 859 (3d Cir. 1983). The court did not leave the development of claim review procedures to the discretion of the plan administrator. *Id.*

Preserving the integrity of the claims process is the unifying principle of the federal common law that courts have developed on whether remand to the plan is appropriate following a finding that the plan administrator made an arbitrary and capricious decision. For example, courts will remand if it is necessary for the plan administrator to review evidence not before the administrator on the original determination. *See, e.g., Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir. 1995). Or, like the *Saffle* case, courts can remand when the plan administrator has applied the wrong standard of disability to the claim, after the court has clarified the correct standard of disability. *See, e.g., Patterson v. Hughes Aircraft Co.*, 11 F.3d 948, 951 (9th Cir. 1993) (rejecting plan administrator's interpretation of term "mental disorder" and remanding to the plan for reevaluation in light of court's interpretation of the term); *King v. Hartford Life & Acc. Ins. Co.*, 414 F.3d 994, 1005-06 (8th Cir. 2005) (remanding to administrator after determining the correct standard of accidental death). In some

situations, where it is not clear from the record that an adverse decision was wrong, courts will remand if the plan administrator has failed to adequately explain the grounds of its decision or otherwise did not provide an adequate claims process, thereby denying the participant an opportunity to prepare a complete record. *See, e.g.*, *DeGrado v. Jefferson Pilot Financial Ins. Co.*, 451 F.3d 1161, 1176 (10th Cir. 2006); *Quinn v. Blue Cross & Blue Shield Ass'n*, 161 F.3d 472, 477 (7th Cir. 1998) (remand appropriate where administrator "fails to make adequate findings or fails to provide adequate reasoning"); *Buffonage v. Prudential Ins. Co. of America*, 426 F.3d 20, 31-32 (1st Cir. 2005) (remanding to administrator so that participant could "have the benefit of an untainted process"). In all of these situations, remand is appropriate because it will enable the claims process to perform the salutary function for which it was designed: to provide a low-cost nonadversarial means for resolving claims and establishing the record for subsequent litigation.

In situations where remand to the plan will not facilitate a better claims process and more efficient resolution of the dispute, courts have overturned arbitrary and capricious decisions and directly awarded benefits. For example, in *Hackett v. Xerox Corp. Long-Term Disability Income Plan*, the Seventh Circuit held that it was inappropriate to remand an arbitrary and capricious decision back to the administrator for further procedures where benefits had been paid for years and the administrator lacked credible evidence

to discontinue the claim. 315 F.3d 771, 776 (7th Cir. 2003). The court reasoned that in such a situation courts should restore the status quo – payment of benefits – whereas remand for more claims procedures might be appropriate where benefits had never been paid in the first instance. *Id.* Similarly, in *Zervos v. Verizon New York, Inc.*, the Second Circuit held that remand to the administrator is not appropriate where the claim record was complete, but the administrator's decision to deny benefits was unreasonable on that record. 277 F.3d 635, 648 (2d Cir. 2002). In this situation, requiring further claims procedures will do nothing but prolong the case, raising rather than lessening the costs of claims resolution. If the record clearly establishes that the participant is entitled to benefits, the most efficient resolution is for the court to simply exercise its power to award benefits under ERISA section 502(a)(1)(B).

Under this body of law, the present case does not warrant remand to decide the contested issue of plan interpretation. Petitioners had the opportunity to, and in fact did, develop an interpretation of the disputed plan provisions during the claims process and there is no suggestion by any party that this claims process was inadequate. The circumstances of the case do not require any additional evidentiary development, and remand to the administrator for a do-over on the interpretation issue will not yield any benefits for subsequent litigation. Instead, the district court should be free to determine the correct interpretation of the plan in its own sound discretion,

as the Second Circuit held it was. Then, as happened in *Saffle, King* and *Grossmuller*, the claims should be remanded to the administrator to determine the amount of benefits each participant is entitled to in light of that interpretation.

II. THE DISTRICT COURT SHOULD NOT BE REQUIRED TO DEFER TO THE PLAN ADMINISTRATOR'S PROPOSED REMEDY FOR ITS OWN STATUTORY VIOLATION.

The Second Circuit's second decision in *Frommert v. Conkright* also affirmed the district court's remedy for the plan administrator's violation of ERISA § 204(h), 29 U.S.C. § 1054(h). The Second Circuit had recommended in its earlier opinion that "[o]n remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits." *Frommert II*, 535 F.3d at 116 (citing *Frommert I*, 433 F.3d at 268). It also recognized "the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated" and "suggest[ed] that it may wish to employ equitable principles when determining the appropriate calculation and fashioning an appropriate remedy."[12] *Id.*

---

[12] As discussed earlier, the issue of appropriate remedies could and should be avoided entirely by properly casting this case as a claim for breach of fiduciary duty, pursuant to ERISA

(Continued on following page)

ERISA § 204(h) contains a built-in remedy: it requires that the improper amendment be deemed void, and the plan enforced according to its pre-amendment terms. But here, as noted by the Second Circuit in *Frommert II*, the prior plan "addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence" and, thus, the district court was required to remedy the statutory violation by crafting its own interpretation of the exiting plan terms. The Second Circuit affirmed the district court's solution as the "selection of one reasonable approach among several reasonable alternatives." *Frommert II*, 535 F.3d at 119 (citing *Lifson v. INA Life Ins. Co. of N.Y.*, 333 F.3d 349, 353 (2d Cir. 2003) (per curiam)). Petitioners argue that the court should have looked to the plan administrator itself to craft a remedy for its own violation of ERISA § 204(h). But generally, where the remedy for a statutory violation requires analysis beyond the automatic implementation of a remedy prescribed by the statute itself, "these choices are, of course, left in the first instance to the district courts. However, such discretionary choices are not left to the court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *See Albermarle Paper Co. v. Moody,* 422 U.S. 405, 416 (1975) (citation omitted). In addition, any equitable remedy crafted by a district court is subject to review

---

§ 502(a)(3), 29 U.S.C. § 1132(a)(3), for which the statute prescribes remedy by "appropriate equitable relief."

by a court of appeal. *See, e.g., Downie v. Independent Drivers Ass'n Pension Plan,* 934 F.2d 1168, 1170 (10th Cir. 1991).

By arguing that the Court is required to defer to the remedy proposed by the plan administrators, rather than accepting the remedy ordered by the district court, Petitioners seek to place the plan administrator in the shoes of the district court and expand the deference given to plan administrators far beyond the scope of plan interpretations within the claim process. The district court should not be required to defer to the plan administrator's proposed remedy, where it is based on a *post hoc* interpretation of ambiguous plan provisions.

CONCLUSION

For the foregoing reasons, the National Employment Lawyers Association urges the Court to affirm the Second Circuit's decision in *Frommert v. Conkright*, 535 F.3d 111 (2d Cir. 2008).

Respectfully submitted,

JEFFREY GREG LEWIS
Counsel of Record
TERESA S. RENAKER
LINDSAY NAKO
JAMES P. KEENLEY
LEWIS, FEINBERG, LEE,
RENAKER & JACKSON, P.C.

REBECCA M. HAMBURG
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION

LYNN L. SARKO
DEREK W. LOESER
KARIN BORNSTEIN SWOPE
KELLER ROHRBACK LLP

Counsel for Amicus Curiae
National Employment
Lawyers Association